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TECHNICAL GROUP OF EXPERTS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY
Montreal, 18-20 October 2004
Item 3 of the provisional agenda*

LIABILITY AND REDRESS (ARTICLE 27)

Compilation of views submitted in response to questionnaire on liability and redress for damage resulting from transboundary movement of LMOs

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SUBMISSIONS FROM GOVERNMENTS

AUSTRALIA

[22 SEPTEMBER 2003]
[ORIGINAL: ENGLISH]

Responding for request for information or initial understandings on the basis of the questionnaire annexed to recommendation 3 (para 3, recommendation 3/1)

Australia does not support the draft questions as outlined in the questionnaire annexed to recommendation 3/1 because those questions go well beyond issues of process and pre-empt discussions by the experts group to be established by the first meeting of the Conference of the Parties serving as the meeting of the Parties.

Given the complexity of the issue of liability in the area of living modified organisms (LMOs), it is better use of resources to first consider any recommendations arising from the experts' group and then seek Governments' views on those recommendations.

Australia does not support linking the Protocol's consideration of liability to that taking place under Article 14 of the Convention on Biological Diversity because the scope of coverage and nature of damage are more explicit under the Protocol.

In Australia's view, Article 27 of the Protocol does not *require* the establishment of a liability regime – it requires a process to be established to appropriately elaborate international rules and procedures in the field of liability and redress for damage resulting from transboundary movement of LMOs. Parties should endeavour to complete this process within four years of entry into force.

It is important to recall that the Protocol deals with the transboundary movement of LMOs and their environmental impact. Arguably, it is not necessary to develop a regime under the Protocol that goes beyond that transboundary movement. National legislation should be adequate to deal with national impacts and should be better placed to deal with the environmental and legal means of redress within such jurisdictions.

When looking at existing international liability regimes, it is important to recall that the Protocol does not regard all LMOs as dangerous. The Protocol specifically leaves that decision to Governments to determine, on the basis of risk assessments and in accordance with their national environmental circumstances. International liability regimes that treat the transboundary movement of a good as inherently dangerous are therefore not readily applicable.

BRAZIL

[20 JULY 2004]
[ORIGINAL: ENGLISH]

Question 1. What types of activities or situation covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?

The activities and situations covered under the Protocol will be acknowledged as potential threats to biodiversity and human health through a process of risk assessment carried out by the competent

authority on a case-by-case basis. The risk assessment will identify activities involving the following aspects:

- potential for transfer of genetic material
- use of material which present phenotypic and genotypic instability
- use of meterial which present pathogenic, toxic or allergenic potential
- incremented potential for survival, settlement and dissemination
- adverse effects on organisms

Question 2. What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

Taking into account the scope of Article 27, the activities or situations, related to transit, handling (including identification and packaging) and use of LMOs, which may cause damage to the conservation and sustainable use of biological diversity and to human health should be covered.

Question 3. How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation and classification of damage within the framework of Article 14 paragraph 2, of the Convention of Biodiversity?

The expression "damage resulting from transboundary movements of LMOs", contained in the Cartagena Protocol on Biosafety, must encompass damages to biological diversity, taking also into account risks to human health. Thereby, the definition of damage within the framework of the Protocol cannot be the same as that in the Convention on Biological Diversity, since the regime created by the latter refers only to damages to biological diversity. Furthermore, the concept of "damage resulting from transboundary movements of LMOs" must be defined based upon the views and legal concepts of the Contracting Parties of the Protocol.

Question 4. To whom should liability for damage resulting from transboundary of LMOs be channelled?

As long as the concept of "damage resulting from transboundary movements of LMOs" remains undefined, it is not possible to single out wo is liable for damage. In principle, however, the liability for "damage resulting from transboundary movements of LMOs" should be channelled to those connected to the occurrence of the damage through a nexus of causality.

Question 5. What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?

As long as the concept of "damage resulting from transboundary movements of LMOs" remains undefined, it is not possible to determine the standard of liability. In principle, however, the notion of strict liability could apply.

Question 6. Should there be any exemptions from liability? If so, under what circumstances?

As long as the "damage resulting from transboundary movements of LMOs" remains undefined, it is not possible to indicate the circumstances under which exemption from liability would take place. However, in principle, it is admissible exemption from liability in case the alleged damage has not occurred or there is no proven nexus of causality between the damage and the activity which produced the risk. It is also admissible exemption from liability in case of force majeure or act of God.

Question 7. Should the liability be limited in time and, if so, to what period?

The specification of time limits is directly related to the definition of "damage resulting from transboundary rnovements of LMOs". In principle, however, Brazil admits that liability should be limited in time. The time limit shall run from the date the damage is known by the claimant.

Question 8. Should the liability be limited in amount and, if so, to what amount?

Due to the complexity of the task of measuring the economic value of damage to biological diversity and human health, monetary parameters should be determined on a case-by-case basis, aiming primarily at redressing the damage caused.

Question 9. How would judgements given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?

The establishment of a regime of liability and redress in the context of the Protocol shall respect, *inter alia*, the legal formalities of each Contracting party regarding recognition and enforcement of foreign judicial and arbitral decisions.

Question 10. What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

Brazil believes it is important to discuss mechanisms of arbitration, which will only be considered relevant if they are enforceable and expedite the settlement of disputes that may arise.

Question 11. What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

The answer to this question depends upon the outcome of the negotiations on previous issues, such as activities and situations covered under the redress and compensation rules to be created, among others.

Question 12. Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

The answer to this question depends upon the outcome of negotiations on previous issues, such as activities and situations covered under the redress and compensation rules to be created, among others.

BULGARIA [25 JUNE 2004]

[ORIGINAL: ENGLISH]

	Q	A
1	What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?	As most likely to cause damage in our country are: • intentional introduction of LMOs into the environment • intentional placing on the market of LMOs for direct use as food or feed, or for processing • unintentional transboundary movements of LMOs • illegal transboundary movements of LMOs
2	What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?	International rules and procedures for transboundary movements of hazardous chemicals and waste could be used as a base.
3	How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation and classification of damage within the framework of Article 14 paragraph 2, of the Convention on Biological Diversity?	The adverse impact and damages should be defined, evaluated and classified on the basis of analysis or studies and the concept should be within the framework of Article 14, paragraph 2.
4	To whom should liability for damage resulting from transboundary movements of LMOs be channelled?	The liability for damage resulting from transboundary movements of LMOs should be channelled firstly to the competent Authority that had granted the consent for the transboundary movements of LMOs and after the circumstances for the resulting damages are recognized – to the subject of causality. An arbitration Committee to the Secretariat has to be involved as well.
5	What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?	The standard of liability for damage resulting from transboundary movements of LMOs, should be fault-based or strict.
6	Should there be any exemptions from liability? If so, under what circumstances?	Exemptions from liability can be made when damages resulting from transboundary movements of LMOs have been caused or contributed by insuperable force or unforeseen events.
7	Should the liability be limited in time and, if so, to what period?	The liability should be limited in time for no more than 10 years period, having in mind the possible long term or accumulative effects of LMOs on

		human health or the environment.
8	Should the liability be limited in amount and, if so, to what amount?	The liability should be limited to: • actual damages + future earnings or • actual damages only
9	How would judgments given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?	The judgments given pertaining to liability and redress in another country/jurisdiction should be recognized or enforced on the base of the national law or on the base of a bilateral agreement.
10	What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?	
11	What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?	
12	Who should have the right to make claims for damage resulting from transboundary movements of LMOs?	Every concerned natural or legal person and State should have the right to make claims for damage resulting from transboundary movements of LMOs.

CAMEROON [30 JUNE 2004]
[SUBMISSION: ENGLISH]

Question 1.

Cameroon has a large Maritime Coast line and serves as a seaport to several landlocked countries in the Central African region e.g. Central African Republic, Chad, etc., and is neighbour to several other central and west African States. Consequently, LMOs could transit through Cameroon to any of its neighbouring countries. Cameroon also has large and porous borders with several African countries (Nigeria, Congo, Gabon, Equatorial Guinea, Central African Republic, Chad). LMOs imported to and on transit to any of these neighbouring countries could therefore, if poorly handled, cause damage to the environment, biodiversity, and human/animal health. Also introduction of LMOs into Cameroon for contained use, field trials or for food, feed or processing (and pharmaceuticals) if not properly handled can cause damage. Accidental or unintentional releases through wind, water, cross-pollination can contaminate traditional/indigenous species of Biodiversity.

Activities of testing LMO viruses, bacteria and crops in Laboratories or in Green Houses where special safety measures need to be adopted and handling of wastes from such LMOs can result to harm on biodiversity and the environment.

Criteria: Criteria to assess such damage can include monitoring and inspection, collection of information from indigenous people and local populations on the type of biodiversity that existed prior to the introduction of the LMO, assessing existing inventories of biodiversity if any, reports from health/veterinary/phytosanitory officials, collection of soil/water/air quality samples and other relevant information from the national Biosafety Focal Point, where they exist.

Some damage to biodiversity may take a long time to manifest. Consequently, monitoring has to be conducted over a long period of time to detect the level of damage. The dimension of the damage can be determined through interviews, questionnaires, data and consultations. Public participation should also be used to measure the scale of the damage.

Question 2

The type of activities to be covered under the international rules and procedures of liability and redress will include all activities involving LMOs notably: LMOs imported into the national territory, Field releases or unintentional releases caused by accidents, research, development, production, manipulation, commercialization and intentional releases of LMOs into the environment. Consequently, the above activities need to be covered under the international rules and procedures referred to under Article 14 of the Convention on Biological Diversity.

Question 3

The concept of damage resulting from transboundary movement of LMOs should be as broad as possible and should cover socio-economic loss, cultural, ethical and spiritual loss, damage to biodiversity, the environment, human and animal health. It should cover the trans-generational loss for present and future generations. It should be in fact broader than the concept covered in Article 14.2 of the Convention on Biological Diversity since the optimum aim of biodiversity conservation is to improve on the livelihood of the populations. It should therefore include environmental damage including biodiversity.

It should be classified as direct and indirect loss to biodiversity.

Question 4

Liability for damage resulting from transboundary movement of LMOs should be channelled to the producer, developer/promoter, and the importer/exporter of the LMO. Where the above entities are incapable of redressing the damages caused, the exporting State of the LMO should be held liable. This should also be examined in line with the "Polluter Pays Principle (PPP)" in Agenda 21.

Question 5

The standards of liability for damage resulting from transboundary movement of LMOs should be Strict Liability. Strict liability especially should be focused on the producer/developer or product base. However, some cases of fault based liability can also be associated with strict liability linked to third parties through whose gross negligence or acts or omissions has resulted to the damage from LMOs.

Question 6 (Exemption from liability)

There should be no exemption from strict liability because everything can be subjected to insurance.

Question 7

Some harm takes a long time to manifest. Therefore the identification of harm and its cause opens up action for liability. Manifestation of harm varies with time, the ecosystem and the type of harm.

Question 8

Liability should not be limited to amount because the amount depends on the magnitude of the harm and it is subject to the conditions of the time and space, and should be evaluated on a case-by-case basis.

Question 9

Judgements given pertaining to liability and redress can be recognized or enforced in another country/jurisdiction through decisions reached within the International Permanent Court for Arbitration and the International Court of Justice (if the parties to the dispute have ratified such treaties) including

Articles 27 of the Convention on Biological Diversity as well as 34 of the Cartagena Protocol on Biosafety if the dispute concerns parties to both the Convention and its Protocol. Also judgements given in another country/jurisdiction could be enforced by applying private international Law Rules.

Question 10

The relevance of arbitration in settling disputes arising in respect to damage in the field of liability and redress is when the parties in conflict do agree to submit themselves to arbitration or when they are present or represented in the place/country of arbitration. It is important that arbitration should be the best preferred option.

Question 11

State liability and State responsibility will guarantee and ensure that precautions are taken to ensure safety measures in the transboundary movement of LMOs through their national legal frameworks.

Question 12

The right to make claims for damage resulting from transboundary movement of GMOs shall be from the affected Parties/States, affected individual/Community, interested individuals, potential victims where there is need for preventive measures.

CANADA [13 JULY 2004]
[SUBMISSION: ENGLISH]

I. Introduction

This submission is based on the request pursuant to decision BS-I/8 for Parties, Governments, international organizations and relevant stakeholders who have not done so to submit their views on the questionnaire developed at ICCP-3. Paragraph 3(b) of the terms of reference (TORs from decisions BS-I/8) asks that the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress (the "Ad Hoc Group") examine the information provided, compiled and synthesized, along with further views submitted on the matters covered under Article 27. We consider it premature to comment on some of the questions at this time, but we have tried to respond as best we can with the information available.

II. Instrument Choice

Based on the Terms of Reference, and experts workshops that have been held on Article 27, including the Rome Workshop and those organized by the Meridian Institute, it is clear that Article 27 does not prejudge the nature and content of any international rules and procedures under Article 27.

Indeed, the terms of reference make clear that the choice of instrument has yet to be made, and will be an important element to be considered by the Ad Hoc Group. In particular, the chapeau to paragraph 4 states that "The Ad Hoc Group on Liability and Redress shall…analyse the issues relevant to liability and redress with a view to building understanding and consensus on the *nature and contents* of international rules and procedures…. In doing so, it shall … (b) *elaborate options* for elements of rules and procedures…".

Because experience shows that only a few of the binding international liability regimes negotiated have entered into force, it is Canada's view that all options should be seriously considered: from no new rules at all, to rules and procedures ranging from the non-binding to the binding, from the national to the international.

III. Response to the Questionnaire

As noted above, it is our view that the terms of reference for the Article 27 process, developed at the first meeting of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety, do not prejudge the outcome of the work of the Ad Hoc Working Group. Where the questions in the questionnaire appear to prejudge this (due to having been developed prior to the TORs) we have noted it.

In particular, we have limited our substantive answers primarily to questions 1 through 3 as these involve critical threshold questions which must be answered first before the Ad Hoc Group can move on to a discussion of the other questions in the questionnaire.

Question 1. What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?

Before assessing the range of instrument options, we consider it important from the outset to understand the problem the Ad Hoc Group is trying to address. In that vein, we consider it appropriate to begin with consideration of "potential and/or actual damage scenarios of concern…in order to identify the situations for which international rules and procedures referred to in Article 27 of the Protocol may be needed". (TORs, Para. 4(a)(i)). We trust that the proponents of rules and procedures for liability and redress under Article 27 will make submissions about the types of scenarios of concern, covered under Article 27, in order to enable the Ad Hoc Group to assess whether international rules and procedures might be needed, and if so, whether binding or non-binding approaches are most appropriate.

Canada remains very interested in the views of others in this regard, as they are essential to moving forward the analysis of liability issues under the Protocol.

Regardless of the outcome under Article 27 discussions, it is our view that prevention of problems, through a strong domestic regulatory system, including risk assessment capability, is key. Further, countries need a domestic civil liability regime if they do not already have one, as some of the matters discussed by the Ad Hoc Group may eventually be considered to fall to domestic liability systems for resolution.

Question 2. What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

As an opening point, we would note that the Protocol does not preclude transboundary movements of LMOs, although it recognizes the need for risk assessment before environmental release in another jurisdiction. Liability rules or procedures under the Protocol would not be "appropriate" under Article 27 if they were so stringent that they would ultimately result in a cessation of transboundary movements.

We would suggest that our work in this area must restrict itself to activities or situations covered by the Protocol, including the provisions of Article 27. While Article 27 might seem broad, it is in fact limited to liability and redress for damage resulting from *transboundary movements* of living modified organisms. Thus, the scope of Article 27 is narrower, for example, than the scope of the Protocol set out in Article 4.

It would seem very doubtful whether any rules and procedures should seek to address any damage arising from intentional release into the environment that was undertaken in accordance with the requirements of the Protocol and approved by the Party of import.

A further question that needs to be closely examined is what is damage "resulting from" a transboundary movement, as per Article 27. This raises the complex issue of causality and a link between the damage and the transboundary movement, which may be difficult to establish.

Question 3. How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation

and classification of damage within the framework of Article 14 paragraph 2 of the Convention on Biological Diversity?

In terms of the order of discussion of the Ad Hoc Group, it is our view that the issue of damage is one that needs to be discussed first, because everything else flows from it.

The Convention on Biological Diversity in Article 14.2 provides that the Conference of the Parties is to examine, on the basis of studies, the issue of liability and redress for damage to biological diversity, except where such liability is a purely internal matter.

The Biosafety Protocol is an international treaty "specifically focusing on transboundary movements" and concerned with "adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health" (Objective (Article 1)). Given that the Protocol is concerned with the conservation and sustainable use of biological diversity, it is questionable whether types of damage beyond that to biological diversity should be included in our examination.

Further, human health is only covered by the Protocol when it arises from adverse effects on biological diversity, and we would therefore conclude that this caveat would also govern the approach under Article 27.

It is clear that a common question under both treaty processes is what constitutes damage to biological diversity. The Ad Hoc Group will need detailed technical information and analysis to support a discussion on such damage. Would mere change to biological diversity constitute damage? How would one adversely affect the variability among living organisms? Is damage to biological diversity the same as damage to the environment? In order to prevent and/or redress damage to biological diversity, we need a thorough understanding of these and related issues.

Each country needs to be in a position so that it can measure whether a transboundary movement has caused a change to its biological diversity, and if so, assess whether the change is an adverse one. To achieve this, it is essential that each country have a baseline understanding of its own biological diversity and of the natural variation that it exhibits over time. Monitoring of changes to biological diversity will be a critical component of this national information base.

Previous workshops have pointed out the need to ensure that there is some level of significance of the damage. The Ad Hoc Group will therefore need technical information to enable it to understand thresholds/significance of any damage to biological diversity in order to have a fruitful discussion.

When discussing redress for damage to biological diversity, the Ad Hoc Group will need to discuss valuation of damage to the conservation and sustainable use of biodiversity, particularly if measures of reinstatement would not be required or when damage is irreparable. The Ad Hoc Working Group will need to be provided with studies to enable us to better understand this complex area.

Overall, Canada supports the idea in decision BS-I/8 that the processes under the two treaties should be linked to the extent that they cross-fertilize each other with respect to areas of commonality, such as in research and discussions about damage to biological diversity and the valuation thereof.

Question 4. To whom should liability for damage resulting from transboundary movements of LMOs be channelled?

Channelling is a topic that is specific to international civil liability regimes. A discussion on channelling presupposes that a decision has been made to set up a new international legal regime. It also presupposes that the regime would create strict liability (as opposed to "fault-based"). Although we consider it premature to be discussing this topic at this time, a few observations may be of assistance because they point to the need for more information that would be required before conclusions can be drawn in this area.

Channelling is the activity of an international civil strict liability regime "deeming" one player in the activity being regulated to be the liable person, regardless of whether they are actually at fault. The idea is that this makes it easier for victims to recover damages.

Channelling assumes that a decision has been made that the activities should be subject to a "strict" standard of liability, as opposed to fault-based. Therefore, a discussion of this point would have to precede discussions on channelling.

Which actor should be selected to be "deemed" liable is a complex and contentious matter, and arguably the reason why some liability regimes have never entered into force. The actor selected to fulfill this role should be one who could actually take action to prevent damage from occurring. However, this means that before this can be discussed, the Ad Hoc Group needs to have a better idea of the types of activity that cause damage that is both of concern to countries and covered by the Protocol.

Presumably the financial liquidity of the deemed liable person is also relevant. However, if the most financially liquid person is not one who can actually prevent the most likely damage scenarios, is it fair and equitable for them to be selected? Another issue is whether there is a chain of actors that could have liability channelled to them and how one would pick one or several from amongst them. On balance, there is a need to have an approach that is fair and equitable to those undertaking an activity which—because it is only controlled, not banned—is considered beneficial to society.

Although the issue of standard of a strict liability is intended to make recovery easier for victims because they do not need to prove that the particular actor caused the damage, this does not remove the necessity of proving that the act complained of actually caused the damage in question. In the context of biological diversity, such questions could become extremely complex. For example, how will causation be determined for impacts on biological diversity that are cumulative in nature? Again, it is our view that the Ad Hoc Group will require robust technical information to address such causation issues.

Question 5. What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?

We consider this premature to be discussed at this time.

Absolute liability is used internationally in very rare circumstances, not applicable here.

Strict liability is reserved for ultra-hazardous activities and until a risk assessment is done for environmental release, there is no knowledge of what the particular risks might be of a particular LMO. Once approved for import, along with any relevant risk management conditions, one would assume it should be subjected to a fault-based standard—the typical standard in most jurisdictions.

Question 6. Should there be any exemptions from liability? If so, under what circumstances?

A discussion of exemptions from liability presupposes that a decision has been taken to negotiate a new legal instrument. No such decision has been taken.

Question 7. Should the liability be limited in time and, if so, to what period?

A discussion of limitation periods presupposes that a decision has been taken to negotiate a new legal instrument. No such decision has been taken.

Question 8. Should the liability be limited in amount and, if so, to what amount?

A discussion of limiting liability presupposes that a decision has been taken to negotiate a new legal instrument. No such decision has been taken.

If discussions head in the direction of a new legal instrument, it would be critical for the Ad Hoc Group to be provided with the expertise and input of the insurance industry.

Question 9. How would judgments given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?

A discussion of this topic presupposes that a decision has been taken to negotiate a new legal instrument. No such decision has been taken.

The Secretariat should provide information to the Ad Hoc Group on work under the Hague Conference on Private International Law with respect to enforcement of judgments and how this could contribute to the Article 27 discussions.

Question 10. What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

It would be useful to have regard to previous submissions of the Permanent Court of Arbitration as part of our base documentation in analyzing these issues. Perhaps the Secretariat could arrange for a presentation on these issues at the outset of the Article 27 process.

Question 11. What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

State liability and responsibility already exist in customary international law, and therefore there is no need to include them in any international rules and procedures. It should be noted that there is only one precedent for State liability in an international civil liability regime, and that is because the activities involve space objects, traditionally the domain of States only, i.e. the State is the operator.

Question 12. Who should have the right to makes claims for damage resulting from transboundary movements of LMOs?

The discussion is premature.

Until it is decided what types of damage should be addressed, or the type of instrument/approach, it is impossible to have a discussion about who can make claims to recover for damage.

COLOMBIA [12 JULY 2004]
[ORIGINAL: SPANISH]

Antes de responder el cuestionario es importante resaltar que el articulo 27 del Protocolo de Cartagena es de imperativo desarrollo al señalar que la Conferencia de las Partes que actúa como Reunión de las Partes del Protocolo (MOP) adoptó en su primera reunión, la realización de "un proceso" en relación con la elaboración apropiada de normas y procedimientos internacionales en la esfera de la responsabilidad y compensación por daños resultantes de los movimientos transfronterizos de organismos vivos modificados, para lo que se analizarán y se tendrán debidamente en cuenta los procesos en curso en el ámbito del derecho internacional sobre esas esferas, y tratará de completar ese proceso en un plazo de cuatro años. También hay que tener presente que a hoy, los palses en desarrollo se encuentran desprotegidos en relación frente a la posibilidad de afactación, a la salud y el medio ambiente, que puede devenir de la introducción al país de OVMs.

1. Respecto de qué actividades o situaciones comtempladas en el Protocolo se estima que es más probable que causen daños en su pais, y qué tipo de criterios ayudarian a evaluar los daños a la diversidad biológica resultantes de movimientos transfronterizos de OVM?

Es claro y evidente que los países en dasarrollo no cuentan con las tecnologias ni la capacidad para estar exentos de daño alguno o que alguna actividad sea menos lesiva para estos. Lo anterior quiere decir que en probabilidad todas las actividades o situaciones contempladas en el Protocolo son susceptibles de afectar o causar daños al país y a su biodiversidad.

En cuanto a actividades que pueden ameritar un mayor nivel de atención, entre otras se han detectado las siguientes:

- Movimientos transfronterizos de OGM de hábitats acuáticos.

- OGM que pueden ser liberados en áreas con presencia de parientes silvestres compatibles.

- Microorganismos genéticamente modificados para ser incorporados en diferentes ecosistemas.

Algunos criterios de evaluación tenidos en cuenta son:

- Presencia o ausencia de especies de la biodiversidad que pueden verse afectadas.

- Estudios que evidencian las posibilidades y condiciones para que se presenten flujos genéticos.

- Estudios de dinámica poblacional que conduzcan a determinar cambios en las poblaciones de organismos de la biodiversidad que pueden verse afectados y grados de afactación.

2. Qué tipo de actividades o situaciones daberían contemplarse en las normas y procedimientos internacionales mencionados en el artículo 27 del Protocolo?

En tanto país megadiverso, Colombia está en un alto nivel de vulnerabilidad frente a las distintas amenazas que pesan sobre la biodiversidad. En el marco de este debate nos referimos particularmente a los peligros que pueden provenir de importaciones de OVM provenientes de otros países, en la medida en que un futuro régimen multilateral se ocuparla únicamente de los daños transfronterizos de OVMs, esto hace que, en este contexto el tema alcance una importancia vital para el país.

En el mismo sentido, existen un sinnúmero de actividades peligrosas que por el simple hecho de que se realicen, implican un peligro al medio ambiente y a las personas de una comunidad. Respecto de estas actividades, la ley debe establecer la responsabilidad objetiva (strict liability) dado que ésta es la aplicable para actividades peligrosas sin que sea necesario entrar a probar la culpa del agente, es decir con solo demostrar el daño se establece el nexo causal que permite reclamar responsabilidad. Por lo tanto y para el caso especifico es claro que la creciente evidencia nos demuestra que la magnitud del daño proveniente de los OVMs, si algo saliese mal, podria tener consecuencias catastróficas e irreparables para la biodiversidad, la agricultura, los sistemas de conocimiento tradicional asociados y la seguridad alimentaria; convirtiendo a las actividades relacionadas con OVMs en peligrosas dada su potencialidad de daño.

Aunado a lo anterior y en razón al principio de precaución, como principio rector del Protocolo de Bioseguridad, es apropiado que la responsabilidad sea absoluta, como asi ha ocurrido con los instrumentos internacionales que regulan el derrame de hidrocarburos, el tráfico transfronterizo de sustancias peligrosas y el de naves y aparatos espaciales. Por ello, dentro de las normas, además del establecimiento de los criterios de responsabilidad, seria conveniente revisar la conveniencia de homologar y aplicar en el Protocolo, lo establecido en otros ámbitos internacionales, por ejemplo en lo relacionado con mecanismos de Garantia Financiera Obligatoria como un prerrequisito para la eficacia del régimen de responsabilidad y compensación, asi como la utilidad que por parte de la industria se cuente con el desarrollo de planes propios de seguros y se disponga de contribuciones obligatorias para la financiación de mecanismos que garanticen la respansabilidad y cumplimiento. Además, valdria la pena discutir, lo relacionado con la destinación especifica de recursos económicos obtenidos por compensación de daños y la generación de lineamientos y directrices por parte de la COP a este respecto.

Cabe señalar que en Colombia, la Ley 99 de 1993 en sus articulos 83 a 88 establece los tipos de sanciones y medidas preventivas frente a las infracciones sobre las normas de protección ambiental y aprovechamiento de los recursos nalurales. Como complemento, la ley 599 de 2000 (Código Penal) establece en el articulo 330 que quien con incumplimiento de la normatividad existente realice actividades de manipulación genética o introduzca ilegalmente al país OGM con peligro para la salud o de los recursos faunisticos, floristicos o hidrobiológicos, incurrirá en prisión de 2 a 6 años y multa de 100 a

10.000 salarios minimos legales mensuales vigentes. Si se produce plaga, enfermedad o erosión genética de las especies, la pena aumentará en una tercera parte.

3. Cómo deberia definirse, valorarse y clasificarse el concepto „dañnos resultantes de movimientos transfronterizos de OVM“, y deberia esa definición ser diferente de la definición, valoración y clasificación del daño en el marco del párrafo 2 del articulo 14 del Convenio sobre la Diversidad Biologica?

Una definición de daño a la biodiversidad debe partir de la definición de biodiversidad del CBD (Art. 2).

Un régimen de responsabilidad deberá cubrir todos los daños o amenazas al medio ambiente, especialmente a la biodiversidad y tomando en cuenta los riesgos para la salud humana, que significativamente puedan poner en peligro la diversidad de los organismos vivos. Esto es, daño a la biodiversidad, más no implica necesariamente daño a cada elemento de la biodiversidad, sino se referirá a aquellos casos en que el daño tiene un impacto significativo. Sin embargo es dado aclarar que en ecosistemas frágiles o vulnerables el daño o la alteración de un componente de la biota puede significar el colapso del ecosistema, en estos casos, es mejor siempre hablar de impactos caso por caso teniendo en cuenta criterios biológicos, económicos y sociales.

En los otros casos se tratará de daño común (a la propiedad por ejemplo).

La responsabilidad deberá cubrir organismos de todas clases (terrestres, marinos, de otros ecosistemas acuáticos, etc.) y los ecosistemas de los cuales son partes.

4. Hacia quién deberia canalizarse la responsabilidad por daños resultantes de movimientos transfronterizos de OVM?

Existen varias necesidades multilaterales en el tema de respnsabilidad y compensación, principalmente: el establecimiento de un régimen de responsabilidad solidaria, dependiendo del nivel de participación en el daño, sistemas o mecanismos de indemnización conjunta, donde se reparta equitativamente los costos de la restauración del equilibrio ambiental entre los sectores de la economía que intervienen en determinada actividad.

Por lo mismo es dado afirmar que la responsabilidad ha de reputarse a la cadena de custodia del OVM en general, y fraccionarse dependiendo del tiempo que este permanezca bajo la orbita de acción del agente custodio. Es decir que se reputa desde el productor del OVM, del estado exportador por haber permitido su circulación y así sucesivamente por la cadena de custodia.

5. Cuál deberia ser la norma de rasponsabilidad por daños resultantes de movimientos transfronterizos de OVM, es decir, deberia basarse en la culpa, objetiva o absoluta?

La responsabilidad ha de ser objetiva, y asi es posible afirmar que regular este tipo de actividades, en las cuales operaría la responsabilidad absoluta, será de gran importancia por cuanto eslo incitarla al sujeto que efectúa este tipo de actividades peligrosas a majorar la gastión de los riesgos que proporciona su actividad en el medio ambiente, se proporcionaria certeza juridica en el evento de que suceda un desastre que ponga en peligro el medio ambiente y la vida de las personas. Lo anterior basado en que existen un sinnúmero de actividades peligrosas que por el simple hecho de que se realicen, implican un peligro al medio ambiente y a las personas de una comunidad. Respecto de estas actividades, la ley debe establacer la responsabilidad objetiva o absoluta, sin que sea necesario probar la culpa del agente, para lograr la protección del medio ambiente, y procurar la recuperación y protección del mismo.

En igual sentido la Constitución Nacional de Colombia en su articulo 88 establece que la ley definirá los casos de responsabilidad civil objetiva por el daño inferido a los derechos e intereses colectivos. Lo cual implica que cuando la ley defina, se podrá en materia de responsabilidad por daño ambiental, establecer los casos en que no es necesario probar culpa del agente, sino simplemente el hecho y el daño. Respecto a este punto, se considera que dada la importancia del Derecho al medio ambiente sano, que sin lugar a dudas es básico para la existencia de la vida en el planeta, este derecho colectivo debe ser protegido de manera integral, por cuanto al causar daño al ambiente, se está poniendo en peligro la vida de toda la comunidad. Razón por la cual se considera vital el desarrollo de las legislaciones nacionales en la materia, y por lo tanto considerar legalmente cuales son las actividades respecto de las cuales debe operar la Responsabilidad Objetiva.

6. Debería haber exención de la responsabilidad y, da ser así, en qué circunstancias?

Las causales generales de exoneración, es decir por Fuerza Mayor y Caso Fortuito (Acts of God).

7. Debería la responsabilidad tener un limite temporal, y de ser así, cuál debería ser ese limite?

Se debería dar un tratamiento caso por caso ya que dependiendo del OVM se dan impactos a corto, mediano o largo plazo y así mismo debe ser considerada la responsabilidad. A hoy existen organismos que durante sus primeros años de vida no tienen ningún problema y después muestran signos de variabilidad genética significativa. Sobre la salud, por ejemplo, los efectos secundarios de alérgénicidad y toxicidad de los OVM pueden darse luego de dos o tres generaciones da utilización de los productos. La responsabilidad no debería tener un tiempo limite.

8. Debería la responsabilidad tener un limite monetario, y de ser así, hasta qué suma?

Debería aplicarse la misma formula que se utilizó en el Protocolo de Basilea, es decir que los limites a la responsabilidad objetiva han de ser determinados por la ley local, dependiendo en la potancialidad que tiene cada agente responsable para resarcir los daños de acuerdo a su posición en la cadena de custodia del OVM. Asi mismo se ha de reglamentar la posibilidad de establecer sistemas o fondos económicos que propendan por la conservación del medio ambiente, cuando no sea posible identificar los responsables del daño ambiental, siguiendo ejemplos claros a nivel internacional como el Convenio del Fondo por Contaminación de Boques en el Mar, el cual prevé un mecanismo de compensación o fondo que tienen como objetivo sufragar las medidas preventivas y medidas de restablecimiento por daños causados por los accidentes derivados de movimientos transfronterizos, y hacerse cargo de la compensación cuando la persona responsable sea desconocida, desaparezca o no pueda localizarse, o cuando esa persona sea económicamente incapaz de cumplir sus obligaciones.

9. Cómo podrian reconocerse y ejecutarse en otro país/jurisdicción las sentencias pronunciadas respecto de la responsabilidad y la compensación?

La mejor manera seria habilitar a los tribunales nacionales del país afectado para que tuviesen competencia para adjudicar sanciones; de igual modo debería explorarse la posibilidad de habilitar a la Secretaria del Convenio de Diversidad Biológica, para que acompañase los procesos y verificase el cumplimiento de las sanciones impuestas.

10. Qué importancia se concederla al arbitraje en la solución de controversias respecto del daño en la esfera de la responsabilidad y la compensación?

La mayor importancia, con y bajo la medlación de la Secrataria del Convenio el Arbitraje seria el mecanismo idóneo para la solución de controversias.

11. Cuál seria el fin de la noción de responsabilidad del Estado y obligación del estado en un régimen de responsabilidad y compensación en el marco del Protocolo de Cartagena?

Existen varias necesidades multilaterales en el tema de responsabilidad y compensación, principalmente: el establecimiento de un régimen de responsabilidad acumulativa o confluente en varios

sujetos a la vez sistemas o mecanismos de indemnización conjunta, donde se reparta equitativamente los costos de la restauración del equilibrio ambiental entre los sectores de la economia que intervienen en determinada actividad.

Por lo mismo es dado afirmar que la responsabilidad ha de reputarse a la cadena de custodia del OVM en general, y fraccionarse dependiendo del tiempo que este permanezca bajo la orbita de acción del agente custodio.

Por otro lado, debería mirarse la responsabilidad del Estado en cuanto al cumplimiento de obligaciones en evaluación, seguimiento, monitoreo e información.

12. Quién tendria derecho a presentar reclamaciones por daños resultantes de movimientos transfronterizos de OVM?

En el caso colombiano, la legislación interna reconoce la existencia de las acciones populares como un mecanismo de protección de los derechos o intereses colectivos relacionados entre otros con el ambiente. Mediante esta acción cualquier persona perteneciente a un grupo o colectividad está legitimada para defender al grupo por unos hechos o conductas comunes con lo cual simultáneamente protege su propio interés, obteniendo en ciertos casos el beneficio adicional de la recompensa que en determinados eventos ofrece la ley. Mas allá del interés colectivo, también se encuentran los derechos individuales que pueden ser afectados, especificamente asociados a daños causados al sector privado, al estado, a agricultores, etc., quienes también podrían hacer las reclamaciones pertinentes y entablar una demanda por daños resultantes del tráfico transfronterizo de OVMs.

Por todo lo anterior, Colombia apoya el desarrollo de un acuerdo internacional sobre responsabilidad y compensación por daños causados a la blodiversidad dentro del marco del Protocolo de Bioseguridad, en el cual se desarrollen los significados o definición de elementos comunes para los siguientes aspectos de la responsabilidad, como:

- Quien es el responsable?
- Que se indemniza? (definición de daño)
- Como se indemniza? (posición de creación de un fondo)
- Por que? (naturaleza de la responsabilidad: objetiva, solidaria, etc.)
- Metodologias de valoración del daño
- Medidas de compensación
- Mecanismos de verificación de cumplimiento

Finalmente, cabe señalar que es necesario que las propuestas que se revisen en el marco del Protocolo para el establecimiento de un régimen internacional de responsabilidad, respondan a una revisión de los marcos nacionales existentes en cuanto a responsabilidad y cumplimiento y a regimenes sancionatorios, con la finalidad de buscar la compatibilidad entre los mismos, y su complementariedad en uno de los aspectos en los cuales se ha detectado falencias, como es el de mecanismos de compensación y cumplimiento para casos especificos de daños derivados del uso de OVM.

EGYPT [28 JUNE 2004]
[ORIGINAL: ENGLISH]

1. Activities and situations

1.1 In terms of Article 27, all four types of transboundary movements (intentional, unintentional, illegal, transit) into the territories of a Party are activities which call for application of the Article. Naturally, the extent of liability will depend on the category of movement. However, in all cases we take the Article to cover not just the movement event but basically the consequences of the release into the environment of material originating from another Party or non-Party, since the case of LMO is not identical with that of hazardous wastes covered by the Basel protocol or the 1966 HNS Convention. In the case of intentional and transit movements damages could originate from supply of incorrect or incomplete information, including legitimate lack of information which neglects application of the precautionary approach. Unintentional and illegal movements are described and regulated, in part in, Articles 17 and 25 respectively.

1.2 Assessment of damage to biodiversity is a dynamic process which is closely linked to the broader issue of ecosystem and biodiversity assessment. With the limited knowledge we now possess on these issues, assessment may often be incomplete and difficult. There are certain cases, however, where damage to biodiversity could be linked to loss of specific economic potential which may be more clearly assessable through scientific as well as economic analysis.

1.3 The concept of "damage resulting from the transboundary movements of LMOs" is basically in harmony with that described under the Article 14 of the Convention on Biological Diversity. However, because of the peculiar nature of LMOs and our limited knowledge and experience with such products focused attention may be required in defining, valuing and classification of such damage

2. Channeling liability for damage

It will be unrealistic to channel liability directly to the operator of the movement event. An obvious case would be faced in certain types of unintentional movements. In the final analysis it will be the holder of a license to release (where applicable), the exporter (where applicable) as well as the developer (sometimes the producer) of the LMO to whom liability may be channeled. In most cases the limits of information which may have caused the damage is under the developer's control, and, principles of fairness dictate that the developer being the prime beneficiary from the release of the LMO should be held responsible. This is in line with the principle that "the polluter pays". Another principle that should apply here is that even though a Party may have authorized the movement through the AIA procedure, such approval was based on information provided by the developer who presumably was licensed to develop, place on the market and allow export of the LMO, by a Party or non-Party. On this basis, the country from which movement originated will normally be the one where liability action would be applied.

3. Standard of liability

3.1 Considering the nature of the damages which may result from LMOs a fault-based liability will neither be fair nor possible. A strict liability regime is required. If, however, fault is demonstrated the level and ceiling of redress may have to be punitive.

3.2 The only exemptions possible would be acts of God, act of war or civil unrest, and interventions by third parties.

However, considering the nature of LMOs, such possibilities are either unlikely or impossible to occur and the Party liable must prove such occurrences to have happened. Most likely this would not be possible especially in cases of intentional release. Because of the dynamic nature of genetic engineering activities, the limited knowledge we currently possess on gene action, the likely possession by the developer of an LMO of undisclosed information, even a risk assessment showing no expected known damage should not exempt from liability.

3.3 As regards proof of causation, causation must be presumed until the defendant can demonstrate otherwise. In the case of LMOs this makes even more sense than the similar stand of the 1966 HNS Convention (Article 1, Para 6).

3.4 Considering the nature of the scientific issues behind the liability regime for LMO. No time limit should be imposed, except for setting a time limit for the claim to be placed after full recognition of the harm . This could be set at as much as thirty years after a permit to release (where applicable) is granted, in order to allow for certainty of investigation in countries with low capacity, in line with the Basel Protocol.

3.5 Considering the nature and scope of possible damage that may result from release of certain LMOs it will not be either fair or realistic to set a ceiling for the compensation. This may require establishing a system of compulsory insurance, rather than a voluntary fund, to cover such liability. The insurers will then be sufficiently careful to make realistic calculation of the probability of damage and cost of restitution. The cost of such insurance must be absorbed by the product as a real cost rather than being passed to the planet's environment and its components (including humans) as is the current practice. This is again in conformity with the principle that "the polluter pays".

Damage caused by fault may carry an additional penalty possibly to be dealt with separately as a crime against humanity.

4. Jurisdiction and enforcement

4.1 The general rule should apply that jurisdiction lie, in the first instance, with the courts of the Party in whose territory the incident giving rise to liability has occurred, and ensuring the recognition and enforcement of judgments arrived at by such competent courts in the territories of other parties. The question of non-parties will be a difficult one to resolve.

4.2 In line with other environmental agreements, any qualified entity should be entitled to submit claims to the competent authority of a party and to have access to a procedure before a court.

4.3 The regime may allow for arbitration in settling disputes arising with respect to damage, with the consent of both Parties.

4.4 In the first instance, the regime should take the form of a legally-binding international agreement linked to the protocol.

4.5 Until the regime is finalized the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety should wok out interim measures which, at the least, reserve the rights of injured parties to future action

EUROPEAN UNION [21 OCTOBER 2003]
[SUBMISSION: ENGLISH]

Introduction

The following answers from the EU to the questionnaire annexed to the recommendation of the third meeting of the Intergovernmental Committee for the Cartagena Protocol are a contribution to the adoption of a process towards the appropriate elaboration of rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms.

The EU is of the opinion that clear agreements on the definition of "damage" and on the scope of the term "damage resulting from transboundary movements" of LMOs in the context of the Cartagena Protocol on Biosafety are necessary prerequisites for the positive evolution of the process described in Article 27 of the Protocol. Of course, other elements of the process are relevant, and many of them are addressed by this questionnaire.

In this submission, the EU has set out a framework to facilitate the further discussion of the relevant issues, indicating key considerations, options and the interlinkages between different elements. The EU is conscious that the possible elements of any liability regime are closely interlinked, and that changes to one element would impact on other elements. Furthermore, each element, including those described below, is likely to change as the process identified in Article 27 develops. The EU reserves its positions on each element as they are the subject of further internal evaluation.

Question 1. What type of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?

1. The EU notes that there is some degree of overlap between the first three questions and that the answer to question 1, in particular, is closely connected to the issues covered in the next two questions. On this basis, the EU will answer the common aspects of the first three questions together (see answers to question 2 and 3).

Question 2. What type of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

1. For a full picture of the activities that could be covered by such rules and procedures, the phrase "damage resulting from transboundary movements of LMOs" should be clarified. In particular, clarification of the concept of "damage" in the context of Article 27 of the Protocol is needed (see question 3).

2. The term 'transboundary movement' is defined in Article 3(k) of the Protocol as "movement of an LMO from one Party to another Party", but it can include movements between Parties and non-Parties under certain circumstances. It should also be clarified to what extent a damage "results", directly or indirectly, from transboundary movement in the sense of Article 27 of the Protocol and should be included in the scope of a liability and redress regime under the Protocol.

3. In line with Article 1 of the Protocol, the international rules and procedures referred to in Article 27 could cover activities or situations such as transport, transit, handling, and/or use of LMOs, which all fall within the scope of the Protocol (Article 4), in so far as these damages result directly or indirectly from the intentional, unintentional or illegal transboundary movement of such LMOs between Parties, or Parties and non Parties, in accordance with Article 3(k) of the Protocol.

4. The international rules and procedures referred to in Article 27 of the Cartagena Protocol could cover activities or situations involving LMOs that are regulated by the Protocol, namely activities

intended for (a) contained use of LMOs; (b) intentional introduction into the environment of LMOs; and/or (c) direct use of LMOs as food or feed, or for processing, regardless of the level of detail of the regulation of these activities provided by the Protocol.

5. Any damage resulting from such transboundary movement could manifest itself in States of transit and/or States of import and, in the case of an unintentional transboundary movement following such accidental or deliberate release, in third States.

Question 3. How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation and classification of damage within the framework of Article 14, paragraph 2, of the Convention on Biological Diversity?

1. This question encompasses several distinct, but interrelated issues. In our view, the following main elements can be identified:

- the categories of damage to be included in a liability and redress regime under the Protocol;
- the definition of the damage, focusing on damage to the conservation and sustainable use of biodiversity;
- the valuation of damage and measures of reinstatement, and
- the relationship between the issue of liability & redress under Article 14 (2) of the Convention on Biological Diversity, on the one hand, and Article 27 of the Cartagena Protocol, on the other.

Categories of damage

2. There are two main starting points for the categories of damage that any rules or procedures elaborated under Article 27 might address. Firstly, there is the reference in the objective (Article 1) and in the scope (Article 4) of the Protocol to ensuring an adequate level of protection in relation to the transboundary movement, transit, handling and use of LMOs that "may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health". Secondly, there is the reference to "damage resulting from transboundary movements of living modified organisms" in Article 27 itself.

3. The regime could cover one ore more of the following categories of damage:

a) damage to the conservation and sustainable use of biodiversity;

b) traditional damage; and

c) damage to human health.

Definition of damage

4. As the conservation and sustainable use of the biodiversity is the central notion that underpins both the Cartagena Protocol and the Convention on Biological Diversity, the EU will, at this stage, focus on damage with adverse affects on the conservation and sustainable use of biodiversity. In this respect, the definition of "biological diversity" in Article 2 of the Convention on Biological Diversity should be the starting point. Accordingly, damage to the conservation and sustainable use of biodiversity would cover damage to the conservation and sustainable use of the variability among living organisms from all sources, including diversity within species, between species, and of ecosystems. However, special attention should be paid to translating the notion of damage to the conservation and sustainable use of biodiversity caused by LMOs into clear criteria for a liability regime.

5. There is a recent trend in liability regimes to include thresholds of damage. The threshold is usually in the form of a non-determined qualitative adjective, such as such 'significant' or 'measurable'. Thus, such an approach would leave the application of a threshold to practice and, ultimately, judicial

institutions. Alternatively, if quantitative thresholds were to be considered, important elements such as baselines and identified criteria for the measurement of such thresholds would need to be addressed.

Valuation of damage and measures of reinstatement

6. The valuation of damage to conservation and sustainable use of biodiversity in monetary terms only becomes an issue if there is no requirement to repair the damage by means of measures of reinstatement. In such a situation, it may be considered to require the payment of compensation *in lieu*. Such an approach, however, would probably raise all sorts of problems, e.g. the determination of the value of damaged components of biodiversity which will always be somewhat arbitrary, the allocation of funds generated, and the administrative structure and costs required for such allocation. For these reasons, an approach that is based, on a case by case assessment, on the implementation of measures of reinstatement seems to be the most attractive.

7. As for measures of reinstatement, a distinction should be made between situations where it is possible to restore the loss of the conservation and sustainable use of biodiversity to the conditions that existed before the damage occurred and situations where that is not possible. One of the objectives of any liability and redress regime for damage to the conservation and sustainable use of biodiversity should be primary restoration. This means that loss to the conservation and sustainable use of biodiversity is restored by replacing the same components at the same place, or in a condition which leads, solely by virtue of the dynamics of the ecosystem, to a condition deemed to be equivalent or superior to the baseline condition, or alternatively by restoring the damage to its sustainable use, where feasible. If this is not possible, reinstatement by equivalent, or complementary remediation, would be the preferred method to restore a loss to the conservation and sustainable use of biodiversity. Depending on the circumstances, complementary remediation could include (a) remedial action to replace the loss to the conservation and sustainable use of biodiversity by other components at the same location or for the same use or (b) remedial action in relation to the same or other components at another location or for other types of use.

8. The valuation of other types of damage will need to be addressed separately.

Convergence of the Convention on Biological Diversity and the Protocol regarding damage to Biodiversity

9. The conservation and sustainable use of biodiversity is the central notion that underpins both the Cartagena Protocol and the Convention on Biological Diversity. The definition of damage under a liability and redress regime of the Protocol, including damage to the conservation and sustainable use of biodiversity, should not be developed in isolation from the discussion on the definition of damage to biodiversity under a liability and redress regime under the Convention on Biological Diversity. As a matter of principle, it seems that these definitions should be developed in an harmonious and complementary manner, taking account of differences in the nature and timing of the two processes.

Question 4. To whom should liability for damage resulting from transboundary movement of LMOs be channelled?

1. The notion of channelling only comes into play when the standard of liability is not based on fault (see question 5). In those instances, liability is normally channelled in accordance with the polluter-pays principle. All the activities must internalise all the costs, and the industries and activities connected with the use of LMOs are not an exception of such a principle.

2. Accordingly, primary liability for damage resulting from the transboundary movement of living modified organisms should rest with the person or persons responsible for the carrying out of an action related to the transboundary movement of living modified organisms that may be directly or indirectly at the origin of the damage. The channelling of liability to States under whose jurisdiction or control

activities involving living modified organisms are carried out (see further reply to question 11) would undermine the application of the polluter-pays principle.

3. If the liability and redress regime is more oriented to prevention (i.e. the ability to anticipate and avoid potential damage-causing events, as covered by the regime, including emergency measures where such damages are expected to occur), liability could be channelled to the person who is in the best position to prevent damage-causing events or that would be at the origin of the initial events that may finally lead to such damages. Such person may, however, not always be easily identifiable, in the jurisdiction where the damage occurred or financially solvable. If the regime is more oriented to the reparation of damage suffered by victims and the environment, then liability could be channelled to whoever, while having a responsibility in the event or process at the origin of the damage that occurred, would be more easily identifiable, judicially accessible or financially solvable (see also answer to question 5, paragraph 2).

4. As for the operator(s) to whom primary liability should be channelled, one or more of the following persons are potentially eligible in view of their possible involvement in a transboundary movement of living modified organisms:

(a) the producer, including the developer;
(b) the notifier;
(c) the exporter;
(d) the carrier;
(e) the importer.

5. A further issue is whether liability should be channelled to a single person or multiple persons. The channelling to multiple persons will result in the need for multiple coverage for liabilities arising out of a single incident, require a bigger share of the capacity of the relevant securities market and, hence, increase the costs of covering such liabilities. Channelling of liability to multiple persons may, however, enhance the options for claimants to recover damages.

6. The introduction of additional tiers of liability of other persons involved in transboundary movements of living modified organisms could be envisaged if the damage is not or only partly redressed by the person to whom primary liability has been channelled, notably if:

(i) no primary liable person can be identified;
(ii) the primary liable person escapes liability on the basis of a defence (see question 6);
(iii) a time limit has expired (see question 7);
(iv) a financial limit has been reached (see question 8);
(v) financial securities of the primary liable person are not sufficient to cover liabilities;
(vi) the provision of interim relief is desired.

7. If the injured party pays for the restoration of the damage, there should be provisions for compensating that party financially for the expenses.

Question 5. What should be the standard of liability for damage resulting from transboundary movements of LMOs?

1. The standard of liability is closely connected with the scope and nature of the defences available to the person to whom liability has been channelled (see answer to question 6). Possible standards of liability are the following:

- *Fault-based liability.* This standard of liability presupposes intent or negligence of the actor for an event that causes damage. Reversal or reduction of the burden of proof has been used in specific circumstances by a number of existing liability and redress regimes.
- *Strict liability.* This standard is based on the fact that the actor's act (or omission) caused the damage without fault needed to be established. This means *prima facie* liability, but the actor can avail itself of a limited set of defences (see answer to question 6). Important differences between strict liability regimes relate to the number and the scope of the defences allowed.
- *Absolute liability.* This standard of liability only requires the establishment of a causal link between an act - or omission - and the damage, and does not allow for defences.

2. The choice for a particular standard of liability or combination of standards depends on the objective and function of the liability and redress regime, which could notably be the prevention of an event that causes damage and/or the reparation of damage (see question 4, paragraph 3).

3. A combination of liability standards is also possible, for example, in cases of potentially hazardous activities (activities that involve risks, which can be assessed and reduced but not eliminated and which may materialize in spite of efforts of a person to prevent a damage-causing event), the imposition of a strict standard of liability on the operator is justified. This could be completed by liability in case of damage caused by negligent or reckless action (fault-based liability). Therefore, it could be considered if a system of strict liability completed with a limited number of defences (see answer to question 6), and combined with a fault-based liability scheme, is a possible option for the regime to be established under Article 27 of the Cartagena Protocol.

Question 6. Should there be any exceptions for liability and under what circumstances?

1. Liability and redress regimes differ according to the number and the scope of the defences allowed. Liability and redress regime that impose strict liability include a limited set of defences in order to exclude liability for damage that is the result of certain events beyond the actors' control. The following defences can be identified for discussion:

(a) natural disasters or 'acts of God';

(b) war and hostilities (including armed conflict, civil war and insurrection);

(c) intentional wrongful acts or omissions of a third party (the exclusion of the primary liable persons may require in this case that all appropriate safety measures have been taken);

Other defences that can be found in international and national liability and redress regimes or drafts for such regimes include:

(a) compliance with a compulsory measure imposed by a public authority;

(b) permission of an activity by means of a generally applicable law or in a specific authorisation issued to the operator;

(c) the state-of-the-art defence for activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.

2. Alternatively, some of the situations listed above, notably (e) and (f), could be introduced as mitigating factors in determining the amount of damages instead of defences. The possibility of including such mitigating factors for liability under specific circumstances and without being detrimental for the victims, could be further explored.

Question 7. Should the liability be limited in time and, if so, to what period?

1. The limitation of liability in time is a common feature of liability and redress regimes to reduce the risk of liability of the person to whom liability has been channelled and to avoid legal proceedings where the evidence has become unreliable.

2. A time limit within which an action may be brought, i.e. an absolute time limit, should result from the nature of the activities covered and the types of damage they may cause. International liability and redress regimes provide for absolute time limits up to 30 years. In the case of damage caused by LMOs, it should be taken into consideration that harmful effects may only manifest themselves after a long period, and damages due to the biological activity of LMOs, or due to the fact that the organisms themselves are living and may reproduce, may only appear after several generations from the (intentional or unintentional) release of the LMO.

3. It should be noted that absolute time limits are distinct from the period during which a victim should be allowed to bring a claim after the identification of the damage and the person liable. International liability regimes provide for relative time limits up to 5 years.

4. A regime of liability may contain absolute and relative time limits to liability, adapted to the specific circumstances and type of damage under which damage caused by LMOs can arise.

Question 8. Should the liability be limited in amount and if so, to what amount?

1. The limitation of liability in amount is used in liability and redress regimes that are based on strict liability to reduce the risk of liability of the person to whom liability has been channelled. In other liability and redress regimes, limitation of liability in amount is not included.

2. In international civil liability and redress regimes, financial limits have been adopted in the form of fixed limits, which would provide for total harmonisation of national financial limits, or minimum limits, which would only provide for partial harmonisation of national financial limits (a floor).

3. Where present, a financial limit is not necessarily equal to and may be higher than the amount, if any, for which the liable person must cover his liability by financial securities. These compulsory financial securities, where applicable, may also be limited, independently of the financial limits, in order for example for the insurance market to be able to take into account the specific situation of the damages to be considered. The liable person can usually not avail himself of any financial limits if the harm is caused by an act or omission done with the intent of doing harm or as a reckless conduct.

4. Where present, a financial limit is introduced by considering the nature of an activity and the possible magnitude of the damage it may cause. Financial limits may differ according to the type and/or scale of the activity and could also be set at different levels for different types of damage.

5. Alternatively, the absence of financial limits per se may also be considered, in order not to limit in advance the possible liability, so that victims may receive appropriate and timely reparation. The absence of financial limits may particularly be studied if routes of redress, other than financial reparation, are to be explored.

Question 9. How would judgements given pertaining to liability & redress be recognised or enforced in another country and jurisdiction?

1. At least if the process under Article 27 of the Cartagena Protocol results in the adoption of a civil liability and redress regime for the transboundary movement of LMOs, such regime should provide for the mutual recognition of judgements, and an expeditious procedure for securing the enforcement of judgements and court settlements. In connection with this, it will have to address certain additional issues in this respect, notably attribution of jurisdiction, and the regulation of *litis pendens* and related actions.

2. The attribution of jurisdiction as well as recognition and enforcement of judgements between EU Member States in commercial and civil matters fall under the exclusive external competence of the EC following the adoption of EC Regulation 44/2001 in December 2000 and its entry into force in 2001. This Regulation binds all, but one, of the Member States.

3. In general, it seems that the inclusion of provisions on jurisdiction as well as recognition and enforcement of judgements in relation to damage resulting from the transboundary movements of LMOs

is important for the operability of an international regime on liability and redress in the context of the Article 27 of the Cartagena Protocol.

Question 10. What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

1. As for the relevance of arbitration in settling disputes arising with respect to damage resulting from the transboundary movement of LMOs, a distinction needs to be made between disputes arising out of the application or interpretation of an instrument containing rules and procedures in the field of liability and redress for damage caused by the transboundary movement of LMOs (see paragraph 2, below) and disputes relating to redress for damage caused by the transboundary movement of LMOs (see paragraph 3).

2. Depending on the type of regime eventually decided, the international rules and procedures to be developed in the context of Article 27 of the Protocol could provide for mechanisms that can be invoked by States Parties thereto to settle disputes with respect to interpretation and application, including an arbitration mechanism. The flexibility is one key advantage of the process of arbitration, which should be open to all the parties concerned. It is noted that the dispute settlement provisions of the Convention on Biological Diversity already apply to the Cartagena Protocol (Article 32).

3. With respect to disputes relating to payments for damage caused by the transboundary movement of LMOs, arbitration mechanisms could provide for an alternative to civil action mechanisms (see answer to question 9). Such arbitration mechanisms are provided by international institutions, such as the Permanent Court of Arbitration that has Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

Question 11. What purpose would the notion of State liability and State responsibility serve in a liability & redress regime within the framework of the Cartagena Protocol?

1. The origin of liability of a State may be (a) an internationally wrongful act (State responsibility) or (b) liability for acts not prohibited by international law (State liability).

2. State responsibility in relation to the transboundary movement of living modified organisms may arise if Parties fail to comply with the provisions of the Cartagena Protocol on Biosafety, or with the provisions of other treaties or rules of customary international law relevant for the transboundary movement of living modified organisms. The general rules on State responsibility are found in the articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, which by and large reflect customary international law (Document A/Res/56/83 of the United Nations). Therefore, it seems that there is no need to develop special rules on State responsibility for damage resulting from the transboundary movement of living modified organisms in addition to these general applicable international rules.

3. State liability in relation to the transboundary movement of living modified organisms would arise if a State could be held liable for damage resulting from all activities, including non-governmental activities, with respect to living modified organisms within its jurisdiction or control. Primary State liability is currently provided for in one treaty, i.e. the 1972 Convention on International Liability for Damage Caused by Space Objects. At the time, primary State liability for activities in outer space was accepted, because all such activities were conducted by governments. With the advent of commercial activities in outer space, this system has come under pressure.

4. We note that the application of the polluter-pays principle is not compatible with the introduction of a system of State liability for damage resulting from the transboundary movement of living modified organisms unless the State itself is acting as an operator.

Question 12. Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

1. The subjects of the right to make claims are different for interstate claims based on international law, on the one hand, and claims based on civil liability, on the other. As for interstate claims based on international law, a State has the right to make claims on its own behalf that may include claims on behalf of its nationals and, in special cases, on behalf of a group of States or the international community as a whole (see Articles 42 to 48 of the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts). As for claims based on civil liability, the right to make claims is governed by the applicable domestic law on procedural matters. The procedural rules of the applicable domestic law vary from jurisdiction to jurisdiction and will continue to do so, unless domestic laws are harmonized in this respect by means of an international instrument.

2. As for claims based on civil liability, the injured person should have the right of action.

3. In this respect, one issue that merits attention is whether claims may also be made by claimants, including stakeholders, who act in the general interest (actio popularis). In general, provisions granting legal standing (right to make claims) should be developed according to the types of damage covered and the objective of the liability and redress regime. Other existing international instruments addressing this issue should also be considered.

Question 13. What other questions or issues are appropriate to raise or answer?

1. The coverage of liability, for instance by means of the establishment of financial securities or by other types of guaranties, is an issue that merits attention and should be addressed in the discussion on a liability and redress regime under the Cartagena Protocol.

2. The rules on the establishment of a causal link between damage and the transboundary movement of particular living modified organisms are an important aspect in the context of the definition of the liability and redress regime under the protocol, which should be addressed in the discussion on a liability and redress regime under the Cartagena Protocol. In a strict liability regime, the proof of the causal link between damage and a transboundary movement of LMO's is particularly important. When the damage results indirectly from a particular transboundary movement of LMO's, this causal link might not always be easily established.

GUINEA BISSAU [30 JUNE 2004]
[ORIGINAL: ENGLISH]

Preserving all the decision of the Conference of Parties serving as the meeting of the Parties to the Cartagena Protocol concerned to the Article 27 of the Protocol.

We have the following answer:

1. One type of activities and one situation may cause damage in our country, to biodiversity, those resulting from transboundary movements of LMOs. Presently we are not in condition to be sure of it.

- Different varieties of plants and seed used by bordering countries and passing through our borders at national level without knowing if there are LMOs and what kind of LMOs they are.

- In other hand, situation related with the food aid, oil, rice and milled maize that may be or not from LMOs products.

2. All activities and situations related with the movement of LMOs from one country to another should be informed to another and be with the prevention of the Parties even if is food aid from the north to the south. The receiver of the aid must be in condition to know the type of foods they are receiving and take decision to receive it or not.

3. We think that in safeguard of the country and the people living there, the same as for the biological diversity preservation, any kind of agreements should be signed between the Parties, or countries without having the public involvement and decision within the receiving country. In any case all kind of damages must be prevented before the accord, and must be in charge of the exporter part. That mean should not be different of the classification of the damages within the framework, article 14 paragraph 2, of Convention on Biological Diversity.

4. The damages resulting from transboundary movements of LMOs should be channeled to the governmental organ responsible for the environment protection in our case to the Ministry of Energy and Natural Resources.

5. We think that the standard of liability should be fault-based, because it depends on the degrees of the damage and also depending of the agreement between the countries parties involved in it.

6. It should be no exception from the liability under any circumstances.

7. It should not be limited in time once, the damages cannot be measured on time or sizes. Because the survival of human kind or the environment protection may be in danger or not.

8. According to answers 5, 6 and 7, it will be very difficult to answer this question. Each situation must be analysed on a case-by-case basis.

9. We think that it should be through clearance house first, UNEP after, or both, with the both countries involved. Then, at last instance, to the organ like international arbitration or supreme court.

10. It should be based on the degrees of the damages, and must be aggraded by the parts with the help of the clearance house, based on the Convention of Biological Diversity.

11. The purpose of State liability and State responsibility must serve in a liability and redress regime with the framework of the Cartagena Protocol – According with the principles of the articles 1 of that Protocol.

12. The Foreign Affairs Ministry of the damaged country must climes proposed by the national environment authorities.

INDIA [21 JULY 2004]
[ORIGINAL: ENGLISH]

Subject: Views on Article 27 "Liability and Redress" of the Cartagena Biosafety Protocol.

1. It is one of the well-established principles of international law that every wrongful act of a State, which has transboundary consequences, invites international obligation and responsibility. In general, liability of the State for environmental damage is based upon violation of an international legal obligation resulting from a treaty, or by rule of customary international law, or even under the general principles of international law recognized by civilized nations. In such cases, a State is obliged to prevent particular environmental harm or to refrain from carrying out or permitting activities, which could lead to environmental damage. The criterion for the purpose is that the environmental damage must be "significant" or "substantial". Some of the milestones on the issue of liability for environmental damage are as follows:

One of the earliest cases that laid down standards of environmental behavior of States was *Trail Smelter Arbitration* (1941) (USA v. Canada). In this celebrated case, the Arbitral Tribunal ruled that:

> *"under the principles of international law,* as *well* as *the law of the United States, no State has the right to use or permit the use of its territory in such* a *manner as to cause*

> *injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".*

The International Court of Justice (ICJ) in the *Corfu Channel* (1949) case, brought by U.K. against Albania, concerning international responsibility for explosion of mines in her territorial waters causing damage to the British warships, underscored *"every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".*

The *1972 Stockholm Declaration* comprised a principle of customary law in Principle 21, which sought to put forward a two-part statement that: .

> *"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".*

Principle 22 of the Stockholm Declaration called upon States to *"develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage".*

Principle 2 of the 1992 *Rio Declaration* reflects wide international consensus on the issue as well as juristic' support. It is also *verbatim* reproduction of Principle 21 of the Stockholm Declaration, except the two additional words - i.e. *"and developmental".*

In the Gabcikovo-Naqvmaros (1997) case between Hungary and Slovak Republic concerning legal validity of actions of the respective parties on a shared international water course (the Danube) especially invoking domestic ecological considerations. The case was referred to ICJ following a special agreement between the parties. Among others, the Court was requested to decide on the legal validity of the Hungarian decision to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabcikovo Project relying on "state of ecological necessity" as well as of the "provisional solution" resorted to by the Czech and Slovak Republic on damming up of the Danube on the Czechoslovak territory and resulting consequences on water and navigation course. The ICJ ruled that:

> *"It is* a *well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.. .that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation".*

2. The issue of "liability and redress" has unleashed considerable debate and differences, as it seeks to hold States responsible for what they have done with "knowledge" or due to their sovereign jurisdiction. In general "liability regimes" are a product of a cumbersome and long drawn process [e.g. nuclear accidents]. Often the inspiration for such regimes is drawn from domestic product liability regimes. As such relevant national legislation on liability and redress for damage resulting from transboundary movement of LMOs will provide a basis for initial proposals on an international liability regime.

3. Basic premise for consideration of "liability" for the transboundary movement of "Living modified organisms [LMOs]" is that a regulatory framework to ensure "safety" also needs to consider "consequences" [if any] of the accidents. Problematic area here remains the absence of a general international law of liability. **Therefore, any liability regime for "biosafety" will need to be** *sui generis* **[tailor-made to suit specific requirement].**

4. Preliminary views on the questionnaire are attached. India is of the view that further consultations through workshops are essential for exchange of views and understanding the nature of concerns.

Questionnaire

Question 1. What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?

A. The Protocol seeks to cover only "transboundary movements" of "living modified organisms" [LMOs], as defined under the Protocol. Logically speaking any act [or even omission] concerning "handling, transport, use, transfer and release" of LMOs that results in adverse effects on environment and human health can be considered to fall within the scope of the Protocol. India considers that damage referred to in Article 27 includes damage to person, damage to environment, damage to property, damage to income and damage to biodiversity. The Starlink Corn episode lends support to include all such kinds of damage under the liability regime in the Biosafety Protocol.

B. The production, handling and exportation of LMOs are activities capable of causing transboundary harm and damage. Basic rule for invoking any liability and redress is not the "normal level" of damage to environment and human health but "significant and special damage" that can be attributed to any activity coming under the purview of the Biosafety Protocol. Article 17 in fact has underscored the criteria of "significant adverse effect". It can be difficult to pinpoint the exact criteria in this respect. It may be mentioned here that an ordinary activity when it causes transboundary harm to the human beings, the operator can be sued under the law of the State of origin or harm and under the law of the victim State as the case may be to the extent the local law permits.

Question 2. What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

Liability and redress pertains to assigning of liability, imposing penalties and providing compensation for any damage or loss resulting from transfer, handling production and use of LMOs. Any "process" that may be launched under section 27 of the Protocol ["appropriate elaboration of international rules and procedures"] will need to address actual movements and transit, handling as well as use of LMOs. It will need to cover any "act or omission" that constitutes "significant adverse effect" to environment and the human health.

The real problem here is that loss or impairment of environment and damage to biodiversity is not covered under traditional law and statutory which would probably cover environment and biodiversity perhaps does not cover transboundary harms. These procedural hurdles very often results in the harm unremedied. Hence India attaches great important for developing liability regime under Cartagena Protocol on Biosafety.

Question 3. How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation and classification of damage within the framework of Article 14,paragraph 2, of the Convention on Biological Diversity?

The internationally accepted standard of "significant and special damage" can be invoked as regards transboundary movements of LMOs too. What is "normal and acceptable" damage [or risk] will need to be spelled out on a scientific basis. The threshold for such a classification of damage could be same "significant adverse impact", as prescribed under Section 14(b) of the Convention on Biological Diversity.

Question 4. To whom should liability for damage resulting from transboundary movements of LMOs be channeled?

In general, liability for damage resulting from transboundary movements of LMOs could be channeled on the basis of an agreement under which such movements take place. Respective parties shall earmark their liability for the 'significant' adverse effect resulting from LMO in question.

The production, handling, and export of LMOs are basically controlled by the operator and therefore the operator should be made liable for the damage that arises out of transboundary harm.

In addition, India feels that it is necessary to consider product liability approach. As LMOs are living organisms, they can multiply and transfer their genes. There is scientific evidence that gene flow is possible. Because of this possibility of horizontal transfer of genes, the native biodiversity can be contaminated. As biodiversity assumes the proportion of a property of State, in case of any transboundary harm of this nature to the native biodiversity, the State is the victim.

Question 5. What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?

Established principles of international law, as deduced from the case law, reveals that the States are, in general, considered strictly liable for acts done either *knowingly or* for *internationally wrongful acts.* Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration explicitly prescribe customary international law principle that States have a *"responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment* of *other States or* of *areas beyond the limits* of *national jurisdiction".* In such cases, States cannot be accept liability on the ground of "territoriality" principle [e.g. Supreme Court's dictum in the Delhi Oleum Gas Leakage case, 1986]. In cases of activities and substances that are 'inherently harmful', the consequences are irreversible in cases of damage. As such liability could be considered strict and absolute.

Question 6. Should there be any exemptions from liability? If so, under what circumstances?

Generally, States have been held liable for something done "knowingly" or "intentionally wrongful acts". Pleas of "contributory negligence" or even vis major are not acceptable [e.g. Bhopal Gas leak case].

Question 7. Should the liability be limited in time and, if so, to what period?

Issue of liability has a prospective effect. Generally statute of limitation provides the period of limitation.

Question 8. Should the liability be limited in amount and, if so, to what amount?

Prescribing limitation of an amount for liability in cases of transboundary movements of LMOs is not prudent both because of their inherently hazardous character as well as difficulty of assessment.

Question 9. How would judgments given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?

In general, private international law rules apply for national enforcement of such judgment. But the Protocol itself can prescribe an obligation for the Parties in this respect.

Question 10. What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

Arbitration is not a dependable mode of resolution of disputes both because it is non-permanent as well as parties have the freedom to choose their own judges.

Question 11. What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

In cases of transboundary damage matters, the State is primarily liable. As the State willingly permitted the LMO to be used in its country, the operator is not liable. Under such circumstances only a global biosafety fund would extend a helping hand as the victim cannot fix any liability on anybody, and

moreover, this is a necessary risk associated with the use of modern biotechnology. The State parties to the Protocol and the biotechnology industry must contribute to this Fund on mandatory basis, so that the situation of this kind may be taken care of. We therefore recommend a Fund to meet the expenses of restoring the biodiversity in case of environmental emergency concerning the loss/degradation of biodiversity where the liability cannot be fixed on anybody.

Question 12. Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

Generally, the State where there are injurious consequences [either on the territory or to people or environment] can claim damages. However, in cases of global commons, it is still a grey area.

IRAN (ISLAMIC REPUBLIC OF) [29 JULY 2004]
[ORIGINAL: ENGLISH]

Question 1. What types of activities or situations covered under the protocol are percieved as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?

A. Intentional or unintentional release of LMOs to the environment. Several kinds of damage may cause by the release of LMOs, including damage to the non-GM agricultural products via contamination, damage to the wild relatives of GM crops. Contamination of aquatic species.

Criteria to assess the damage.

a. Regular monitoring by scientific body.

b. Random check

c. Evaluate the suspicious cases in the environment.

Question 2. What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the protocol?

A. Establishment of scientific body.

a. Definition of terms: damage, hazard, catastroph to the environment.

b. Establishment of special legal and judi system for LMO issues, as well as damage evaluation system.

Question 3. How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified and should this be different from the definition, valuation and classification of damage within the framework of Article 14 paragraph 2, of the Convention on Biological Diversity?

A. As mentioned earlier on question 2 first of all the size and amount of the damage should be quantified and classified by a scientific body.

Nature of the damage, reversible or irreversible and possibility of release should be defined as well.

Question 4. To whom should liability for damage resulting from transboundary movements of LMOs be channeled?

A. Importer and transporter, either public or private sector.

Question 5. What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is should it fault-based, strict or absolute?

A. Depends on nature, size and quantity of damage, possibility of redress, definition of damage (damage or catastrophy).

Question 6. Should there be any exemptions from liability? If so, under what circumstances?

A. In case of unintentional contamination of non-GM plants by pollen grain of the GM plant across the boundary. Anyhow the case should be evaluated by a legal scientific body.

Question 7. Should the liability be limited in amount and if so to what period?

A. Depends on redress or eradication of damage as well as duration on which damage may emerge again.

Question 8. Should the liability be limited in amount and if so to what amount?

A. The amount should be defined and quantified by a scientific and legal body, considering the size of damage, nature of damage, cost to repair, effective duration and time of damage.

Question 9. How would judgments given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?

A. By international legal body

Question 10. What would be the relevance of arbitration in setting disputes arising with respect to damage in the field of liability and redress.

A. A scientific committee and a legal body appointed by MOPs.

Question 11. What purpose would the notion of State liability and redress be recognized or enforced in another country/jurisdiction?

A. The purpose should be reparation of damage by the State that produces the LMOs.

Question 12. Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

A. State and private sector (depend on nature, size and target).

LATVIA [30 JUNE 2004]
[ORIGINAL: ENGLISH]

1 Release into the environment of living modified organisms that may become invasive “species” and/or may hybridize with native wild species. No criteria have been elaborated so far for assessing damage to biodiversity resulting from transboundary movement of LMOs.

2. Illegal transboundary movement of LMOs and damage to biodiversity resulting from it should be covered under the international rules and procedures referred to in Article 27 of the Protocol.

3. Definition, valuation and classification should be different. For biodiversity there is more experience and methodologies available. For assessing damage to biodiversity resulting from LMOs there is no experience. Specific methods have to be elaborated first to detect LMOs in nature and to define nature and scope of damage

LIBERIA [30 JUNE 2004]
[ORIGINAL: ENGLISH]

Question 1. What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?

VIEWS:

a) Intentional introduction of LMOs into the environment as well as illegal transboundary movement.

b) The criteria that can be helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs include genetic contamination, displacement of unmodified population,predation, etc.

Question 2. What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

VIEW: *These activities may include avoidable accidental releases or illegal transboundary movements.*

Question 3. How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation and classification of damage within the framework of Article 14 paragraph 2, of the Convention on Biological Diversity?

VIEW: *This should be defined as damage only caused by LMOs to biological diversity but **not** limited to such. Other damages could include human health, socio-economic, etc. Thus the protocol Article 27 concept of damage should be viewed as different from Article 14 paragraph 2 of the Convention on Biological Diversuty.*

Question 4. To whom should liability for damage resulting from transboundary movements of LMOs be channeled?

VIEW: *Through institutional hearing process in the party of import, as provided for under the Administrative Procedure Act, in the case of Liberia.*

Question 5. What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?

VIEW*: Strict Liability*

Question 6. Should there be any exemptions from liability? If so, under what circumstances?

VIEW*: Yes. Under the circumstances of Force Majeure.*

Question 7. Should the liability be limited in time and, if so, to what period?

VIEW*: Yes. 15 (fifteen years).*

Question 8. Should the liability be limited in amount and, if so, to what amount?

VIEW*: No. It should be considered on case-by-case basis.*

Question 9. How would judgments given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?

VIEW*: Through mutual recognition and enforcement of judgment between parties of Export and Import.*

Question 10. What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

VIEW*: It will expedite resolution of the issue.*

Question 11. What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

VIEW: *It impresses on Party States to take seriously their obligation to impose strict regulations on LMOs so as to avert possible risks to biological diversity and human health.*

Question 12. Who should have the right to make claims for damage resulting from transboundary movement of LMOs?

VIEW*: Affected persons, group, community, or State.*

MALI [1 JULY 2004]

[ORIGINAL: FRENCH]

I. DECISION BS-1/8 : Questionnaire sur la Responsabilité et la Réparation

Question 1

Les types d'activités ou de situations de dommages : l'importation, la manipulation et l'utilisation, les mouvements transfrontières, l'utilisation pour l'alimentation humaine et animale, la transformation, l'introduction intentionnelle dans l'environnement, les mouvements transfrontières non intentionnels et illicites (échanges informels entre paysans et au niveau des frontières respectives et autres), la mauvaise évaluation des risques, le mauvais échange de l'information, la faiblesse des capacités nationales pour appréhender toutes les questions de biosécurité et de biotechnologie, la mauvaise information du public (avec ses conséquences socio-économiques), l'insuffisance de la participation du public.

Les critères d'évaluation des dommages : l'impact sur la santé humaine et animale, l'impact socio-culture, l'impact sur la biodiversité (espèces végétales et animales domestiques et/ou sauvages), l'impact sur les autres éléments du milieu (sol, eau, air etc).

Question 2

Les types d'activités ou de situations qui devraient être couverts par les règles et procédures internationales :

Les mouvements transfrontières intentionnels, les mouvements transfrontières non intentionnels et illicites, l'activité agricole, la contamination du milieu naturel, l'activité commerciale.

Question 3

Sur la définition, l'évaluation et le classement du concept des dommages :

Procéder au cas par cas sur la base du paragraphe 2 de l'article 14 de la Convention sir la diversité biologique.

Question 4

Sur la responsabilité des dommages :

La personne (physique ou morale) responsable du mouvement, dans le cas ou l'intérêt (le profit commercial) est partagé tous les partenaires commerciaux.

Question 5

Le degré de responsabilité devrait être fonction de la faute.

Question 6

On pourrait faire des exceptions à la responsabilité dans le cas d'actions humanitaires sans équivoque.

Question 7

Pour la limitation de la responsabilité il faudra statuer au cas par cas.

Question 8

Le seuil financier de la responsabilité ne saurait être déterminer en amont, il doit donc être déterminé dans le cas d'espèce.

Question 9

Il faudra des négociations bilatérales impliquant les gouvernements des pays concernés, surtout dans les cas les intérêts des pays sont très liés.

Question 10

Pour la pertinence de l'arbitrage :

Se référer au statut des protagonistes (à travers leurs pays) dans le Protocole, dans la Convention sur la diversité biologique et les Nations Unies, le cas échéant les organes de règlement des litiges de ces accords par préséance au besoin.

MAURITIUS [29 JUNE 2004]
[ORIGINAL: ENGLISH]

1. It is perceived that transboundary movement as well as importation of LMO material may cause damage to existing local biodiversity.

4. The Convention on Biological Diversity should establish a legal entity/structure to arbitrate between parties.

5. Standard of liability for damage resulting from transboundary LMO movements should be fault-based.

6. As a small island developing State (SIDS) there is a natural tendency to prefer some exemptions from liability. However, it is felt that there should be no exemptions due to the possibility of such situations creating a precedence.

7. Liability should not be limited in time: any detrimental consequence on human health may surface only after a long time.

8. It is felt that the quantum for liability be rather dependent on a case-by-case basis.

9. Parties should abide by international conventions/obligations.

10. Arbitration will be relevant if prior "amicable settlement" cannot be made.

11. Although notions of State liability and responsibility are desirable, in the sense that the State should provide legislation and regulations to prevent or limit any possible harmful consequences which may arise from the introduction, movement or use of LMO's, liabilities would rest with GMO permit holders (those persons who request to export, import, produce, release or distribute GMO's and have obtained a permit in the country to do so).

12. Anybody should have that right, but he would be *assisted* by the country.

MEXICO [20 FEBRUARY 2004]

[ORIGINAL: SPANISH]

Cuestionario sobre responsabilidad y compensación por daños resultantes de movimientos transfronterizos de organismos vivos modificados, presentado en la reunión ICCP-3.

1. ¿Qué tipo de actividades o situaciones deberían contemplarse en las normas y procedimientos internacionales mencionados en el artículo 27 del Protocolo?

Las actividades que deberían estar reguladas en los procedimientos y reglamentos internacionales (Artículo 27) deberían ser aquellas relacionadas con los movimientos transfronterizos de OVM, incluyendo movimientos intencionales, no intencionales y tránsito y situaciones derivadas de este movimiento que incluyen manipulación y utilización.

- Los movimientos transfronterizos a un Estado Parte.
- Los movimientos transfronterizos a un Estado no Parte.
- Los movimientos transfronterizos en tránsito que se efectúen entre uno o más Estados Parte transitando por uno o más Estados no Parte; entre dos o más Estados no Parte transitando por uno o más Estados Parte y los realizados entre uno o más Estados Parte con otro (s) Estados no Parte transitando por uno o más Estados Parte o Estados no Parte.

En todos los casos deberán considerarse tanto la liberación intencional como la no intencional en uno de los Estados Parte o no Parte.

2. ¿Qué tipo de daños resultantes de movimientos transfronterizos de OVM deberían compensarse?

Aquellos daños significativos que afecten al ambiente, a la salud –sanidad animal, sanidad vegetal y salud humana-, a la conservación y utilización sostenible de la diversidad biológica/genética, una vez que el impacto o daño haya sido demostrado.

3. ¿Cómo debería definirse, valorarse y clasificarse el concepto de "daños a la diversidad biológica"? y, ¿debería ser diferente de la definición, valoración y clasificación de este concepto en el contexto del Convenio?

Consideramos que la definición daño deberá hacerse dentro del grupo de expertos que se conforme por la COP-MOP y su clasificación se deberá hacer en función a los elementos de la definición. Se propone que el mismo Secretariado del CDB promueva un seminario internacional para establecer los criterios y metodologías de evaluación.

El concepto de daño debe definirse de manera comparativa con un "baseline" y establecerse para cada caso en particular, esto es daños que abarquen cualquiera de los niveles de la diversidad biológica (genes, especies, ecosistemas). La valoración y clasificación del daño debe armonizarse y establecerse con bases científicas y debe además considerar la complejidad de los diferentes niveles de diversidad biológica que pudieran verse afectados (por ejemplo un bosque monocultivado vs. selva perenifolia).

El daño deberá valorarse *caso por caso*, sustentado en evidencia científica y técnica disponible, considerando, entre otros aspectos, el organismo receptor, el área de liberación y las características de la modificación genética y los antecedentes que existan sobre la realización de actividades con el organismo de que se trate.

Se sugiere que el grupo de composición abierta de expertos jurídicos y técnicos, considere las implicaciones, en los foros comerciales, de dar un trato distinto a un OVM.

4. ¿Hacia quién debería canalizarse la responsabilidad por daños resultantes de movimientos transfronterizos de OVM?

La canalización de la responsabilidad por daños deberá delimitarse caso por caso, evaluando todas las fases del desarrollo del organismo y en función del acto que provoca el daño, considerando la responsabilidad objetiva y la responsabilidad por culpabilidad.

5. ¿Cuál debería ser la norma de responsabilidad por daños resultantes de movimientos transfronterizos de OVM, es decir, debería ser basada en la culpa, objetiva o absoluta?

Debería ser basada en la responsabilidad subjetiva y objetiva.

6. ¿En qué circunstancias debería haber exención de la responsabilidad cuando los movimientos transfronterizos de OVM han causado daños?

La exención de la responsabilidad debe ocurrir en casos de desastres naturales cuando los daños han sido causados en eventos o situaciones ajenas al control de los involucrados en la producción, uso, manejo, transporte y liberación intencional de los OVM. Por caso fortuito, fuerza mayor, y el peligro extremo.

7. ¿En qué medida debería establecerse una relación causal entre los daños y los OVM?

Dado que una relación causa-efecto es difícil de establecer para los OVM debido a la complejidad de sus relaciones con el ambiente receptor, sugerimos que esto deberá establecerse caso por caso.

8. ¿Debería la responsabilidad tener un límite de tiempo, y de ser así, hasta cuánto?

Para la detección del daño o efecto adverso no debería haber una fecha perentoria, ya que algunos de los efectos pueden ser detectados en el largo plazo, además de que la detección del daño dependerá de la complejidad del ambiente receptor del OVM. En principio, se da un plazo de 30 años para la prescripción de la acción correspondiente, que es uno de los plazos máximos en el ámbito internacional, y podría ampliarse en situaciones específicas, de acuerdo a su gravedad. Sin embargo y para efectos prácticos un plazo de 30 años es demasiado y podría suceder que nadie asumiera la responsabilidad después de tanto tiempo, o que hubiera problemas de otro tipo como la desaparición de compañías o industrias o fusión de las mismas. Por lo anterior convendría definir los límites no solo considerando cuestiones biológicas sino de aplicación práctica en materia jurídica.

9. ¿Debería la responsabilidad tener un límite monetario, y de ser así, hasta cuánto?

Consideramos que la responsabilidad no debería tener un límite monetario, en virtud de que se deberá de considerar la gravedad de cada uno de los casos, y la complejidad de niveles de diversidad biológica/genética afectados. Consideramos que la *compensación* debería estar más enfocada a la reparación del daño que a lo económico.

10. ¿Debería establecerse una garantía financiera para compensar por daños resultantes de movimientos transfronterizos de OVM? De ser así, ¿cuál o cuáles serían los mecanismos apropiados?

El Gobierno de México se encuentra aún analizando la viabilidad de establecer o no, una garantía financiera para compensar estos daños.

11. ¿Qué tribunales o jurisdicciones deberían tener competencia para adjudicar indemnizaciones por daños resultantes de movimientos transfronterizos de OVM?

Por lo que toca al ámbito nacional, se pueden ejercer acciones administrativas, civiles y/o penales, provenientes de daños resultantes de movimientos transfronterizos de OVM, como se detalla a continuación: A) Por lo que toca a la materia administrativa, sería competente para conocer del asunto, la Procuraduría Federal de Protección al Ambiente (PROFEPA), de conformidad con el artículo 118, fracciones I, II, XI y XII, del Reglamento Interior de la Secretaría de Medio Ambiente y Recursos Naturales. B) En materia civil, serían competentes los juzgados civiles del fuero federal, demostrando la

afectación a los intereses del particular. C) En materia penal, hay que considerar que en el Código Penal Federal, además de existir delitos ambientales, también está tipificado específicamente el delito de bioseguridad, por lo cual la autoridad competente será la Procuraduría General de la República, ya sea por instancia de la PROFEPA –con base en las facultades enunciadas en el Reglamento Interior de la SEMARNAT y en disposiciones particulares de los delitos ambientales previstos en el Código Penal Federal, como el artículo 420 quater-, por instancia de la SEMARNAT –con fundamento en los artículos 169 y 182 de la LGEEPA- o a instancia de cualquier persona -con fundamento en el artículo 182 de la LGEEPA-.

En el ámbito internacional, cabe aclarar que si bien el Protocolo está integrado por gobiernos y el reclamo puede darse del Gobierno de un Estado Parte a otro o por un particular a través de órganos de gobierno, también podría suscitarse un conflicto entre particulares, vinculado con el movimiento transfronterizo de OVM, pensando, por ejemplo, en una empresa de distribución que importe alimentos genéticamente modificados (OVM), y que tal cargamento sea detenido en fronteras y por tal motivo el importador/distribuidor incumpla con terceros que adquirirían el cargamento. En este caso, podrían darse conflictos en las materias internas señaladas en el párrafo anterior, y entre particulares o bien suscitarse un conflicto entre particulares que podría llevarse, por ejemplo, hasta un arbitraje. Lo deseable es que los conflictos internacionales derivados de la aplicación del Protocolo de Cartagena, donde puedan verse afectados intereses de particulares, se diriman a través de una reclamación/demanda por conducto de su autoridad nacional competente.

Por lo que toca al mecanismo idóneo de resolución de controversias entre gobiernos, se puede recurrir al procedimiento de conciliación o arbitraje comprendido en el anexo II del Convenio sobre la Diversidad Biológica, con fundamento en el artículo 27, numerales 3, inciso a) y 4, del mismo Convenio. Igualmente, el numeral 5 del mismo precepto, precisa que "las disposiciones del presente artículo se aplicarán respecto de cualquier protocolo, salvo que en dicho protocolo se indique otra cosa", por lo cual se aplicaría al Protocolo de Cartagena, el cual, además de ser emanado del Convenio sobre la Diversidad Biológica, no establece disposición expresa sobre el particular o en contravención al Convenio.

12. ¿Quién debería tener el derecho a entablar una demanda por daños resultantes de movimientos transfronterizos de OVM?

Podrán iniciar procedimientos de reclamación de daños resultantes de movimientos transfronterizos de OVM:

- Los Estados Parte; y
- Los particulares de los Estados Parte que pudieran resultar afectados por cualquiera de las actividades realizadas por los OVM.

Tratándose de controversias internacionales, los particulares de los Estados Parte que pudieran resultar afectados por cualquiera de las actividades realizadas por los OVM, efectuarán la reclamación/demanda por medio o a través de su autoridad nacional competente.

NORWAY [15 OCTOBER 2003]
[ORIGINAL: ENGLISH]

Question 1. What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of living genetically modified organisms (hereinafter referred to as LMOs)?

Question 1 is partly overlapping with questions 2 and 3.

See answer to question 2 with regard to activities/situations most likely to cause damage nationally. The activities covered under the protocol are also those that are likely to cause damage in our country. In addition, handling and use of LMOs at the national level are perceived as situations which may cause damage.

With regard to criteria to assess damage to biodiversity, see answer to question 3 explaining how damage resulting from transboundary movements of LMOs could be defined, valued and classified.

Question 2. What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

1. The point of departure should be the protocol provisions which refer to four types of transboundary movements of LMOs:

- Intentional transboundary movements of LMOs namely: LMOs for intentional introduction into the environment of the Party of import; LMOs intended for direct use as food, feed or processing; and LMOs for contained use (*inter alia* Articles 4, 6, 7, 11)
- Unintentional transboundary movements, for example when LMOs cross national boundaries unintentionally. Such movements should include accidental releases of LMOs (Article 17)
- Illegal transboundary movements (Article 25)
- LMOs in transit through the territory of a Party (Articles 4 and 6)

It will be necessary to define the beginning and the end of a transboundary movement. According to Article 3(k) transboundary movement is defined as "the movement of living modified organisms from one Party to another Party, save that for the purposes of Article 17 and 24 transboundary movements extend to movement between Parties and non-Parties." A narrow definition would seem to imply only the actual shipment or transport. A broader definition on the other hand would go beyond the actual shipment and include activities at the national level such as handling and use of LMOs. An argument in favour of the latter approach is that potential damage from LMOs may be shown a long period after the completion of a shipment.

Question 3. How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation and classification of damage within the framework of Article 14 paragraph 2, of the Convention on Biological Diversity?

Damage resulting from transboundary movements of LMOs should as a minimum cover damage to biological diversity and human health. This is in accordance with Article 4 stating that the Protocol should apply to LMOs that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health.

The term damage in the Norwegian Gene Technology Act covers damage to persons, objects and property. Also damage in relation to sustainable use of biological diversity such as economic loss due to the presence of LMOs in agriculture or plant production may be covered under the Norwegian Gene Technology Act. This means i.e. that organic or conventional farmers could get compensated as a result of GMO contamination of organic crops. The Gene Technology Act is also intended to apply to changes in the ecological environment that occur, for example when a new organism supplants an indigenous species (see preparatory work for the Gene Technology Act contained in Proposition No.8 to the Odelsting (1992-93).

This question also touches upon valuation of biodiversity damage, *inter alia* the duty and costs of reinstatement or restoration of the impaired environment. According to the Norwegian Gene Technology Act, the supervisory authority may impose measures on the person who is liable for damage, for example

measures to retrieve or take other measures to combat organisms within a specified time, including measures to restore the environment to its previous state, as far as possible.

The order to restore the environment to its previous state presupposes that the discharge has altered the state of the environment, for example, the occurrence of or the stock or stand of particular animals or plants, or the general state of the environment, for example adverse changes in the ecosystem. The extent of restoration would depend on the changes that have occurred in the environment, and would have to be assessed in each particular case. For example an impact or risk assessment carried out pursuant to the Law would contain a description of the environment before the deliberate release or discharge. Restoration may be carried out by replanting of cultivated or wild plants, by release of fish or by building up a stock of wild animals. In some cases, complete restoration will not be possible, or not within the foreseeable future.

As far as possible, synergies with the definition of damage to biological diversity to be developed under Art. 14(2) of the Convention on Biological Diversity should be ensured.

Question 4. To whom should liability for damage resulting from transboundary movements of LMOs be channelled?

2. According to the Norwegian Gene Technology Act the duty to implement measures lies with "the person responsible for the activity", who is defined as the person who produces or uses GMOs within the meaning of the Act. "The person responsible" is a physical or legal person who operates the activity ("operator") from which the GMOs are discharged. In general the person with the duty to provide information or to obtain approval under the Act may be subject to orders under the Act. This is also in line with the polluter-pays-principle.

3. It is also possible that there may be other persons responsible depending on the nature of the measures to be taken. For example, a transporter would be responsible for taking immediate measures if GMOs escape by accident during transport. However, it is normally the owner or sender who has to pay for measures. Likewise several persons may be held liable for damage resulting from GMOs under the Cartagena Protocol for example the producer; the notifier; the exporter; the importer, the user, the State etc. depending upon their role in LMO related activities causing damage to biological diversity or human health.

Question 5. What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?

4. The starting point should be strict liability for damage, namely regardless of any fault on the person liable.

5. Whether the strict liability scheme should be completed with a fault-based regime (liability in case of damage caused by negligence) needs to be further discussed.

Question 6. Should there be any exemptions from liability? If so, under what circumstances?

Yes, some exemptions are needed, in particular in cases of strict liability. Some exemptions such as natural disasters or "acts of God"; war and hostilities etc. should be discussed. One should also consider the need for exemptions with regard to lawful activities.

Question 7. Should the liability be limited in time and, if so, to what period?

Both absolute and relative time-limits should be considered. For example Norwegian legislation (Act No. 18 of 18 May 1979 relating to Statutory Limitation) has imposed the following time limits:

A statutory limitation which comes into force when the first of the time limits consisting of 3 or 20 years expires. The relative three year time limit expires three years from the day the injured party obtained or should have obtained the necessary information about the damage and the person responsible.

The claim becomes time-barred in any case at the latest 20 years after the damaging action or other grounds for liability ceased.

Question 8. Should the liability be limited in amount and, if so, to what amount?

This is linked to the question of financial security. According to the Norwegian Gene Technology Act a duty to take insurance or provide financial security for liability may be imposed as a condition in the approval for deliberate release or contained use of LMOs.

Question 9. How would judgments given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?

Like any civil liability regime, also the Cartagena Protocol regime should contain provisions with regard to recognition and enforcement of judgments in relation to damage caused by transboundary movements of LMOs. The issue of jurisdiction has two aspects: (a) determining the competent court to entertain claims for compensation; and (b) ensuring the recognition and enforcement of judgments arrived at by such a competent court in the territories of the contracting Parties. Examples of relevant provisions can be found in *inter alia* the Basel Protocol dealing with liability for transboundary movements of hazardous waste, which leaves to the victim the choice of which competent court to seize. Once judgment is delivered it should be recognized as binding in the respecting territories of Parties, and a victim should be able to enforce it in any of those Parties.

Question 10. What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

6. Reference is made to the dispute settlement mechanism of the Convention of Biological Diversity which is also the dispute settlement mechanism for the Protocol. If the process under Art. 27 results in the adoption of a legally binding instrument under the Protocol, that instrument should provide for a dispute settlement mechanism, including an arbitration mechanism.

Question 11. What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

Needs to be further considered.

Question 12. Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

7. According to Norwegian law a claim for compensation may, irrespective of whether a claim is put forward by the authorities (in this case the Pollution Control Authority), also be made by a private organization or an association with a legal interest in the matter.

REPUBLIC OF PALAU [24 SEPTEMBER 2003]
[ORIGINAL: ENGLISH]

Question 1. What types of activities or situations should be covered under the international rules and procedures refened to in Article 27 of the Protocol?

The use, production, import, sale or other placing on the market of LMOs, as well as the operation of installations and premises intended for the handling, use, and introduction into the environment of LMOs. Manufactures and distributors should be strictly liable where LMOs are released into the environment, or through their production, import, sale, placing on the market, operation of any premises, etc. which causes a risk to human health or to the environment, regardless as to whether the risk

was greater than foreseen when the use of LMOs was approved. Develop environmental protection legislation that establishes a general duty not to undertake an activity that pollutes or reasonably could pollute the environment. This legislation should allow persons to apply to the court for compensation, including provisions for the Government to have the right to recover certain governmental remediation costs.

Question 2. What types of damage resulting from transboundary movements of LMOs should be compensated?

Personal injury, damage to any and all kinds of property regardless as to whether it is owned by an individual, corporation, Government or any other legal entity, costs of preventive measures and restoration of environment (ecological damage), and loss of past and future income deriving from any economic interest in any use or enjoyment of the environment.

Question 3. How should the concept of "damage to biological diversity" be defined, valued and classified, and should this be different from the definition, valuation and classification of this concept in the framework of the Convention?

The valuation of environmental damage should not be limited solely to definable financial loss. The Republic of Palau's ability to recover damages for the loss of biological diversity should be extended to non-pecuniary damages such as the loss of the right to enjoy the environment. The draft Swiss Gene Technology Act defines the "harm to the environment" by the costs of necessary and appropriate measures taken to restore destroyed or harmed components of the environment, or to replace them with components of equal value. The Republic of Palau agrees with this valuation. The Swiss Gene Technology act also states, "[T]he extent of the restoration will depend on the changes that have occurred in the environment, and will have to be assessed on a case by case basis- Private citizens would most likely be limited to traditional measures of damages, such as economic loss, and general damages."

Question 4. To whom should liability for damage resulting from transboundary movements of LMOs be channelled?

Liability should attach to any person who has the operational control of the activities at the time of the incident causing damage. The Republic of Palau agrees with the Danish Act that defines a person as someone; "who is causing pollution while participating in a commercial or public activity shall indemnify the loss resulting from this pollution". In Finland, a responsible person is identified as the one whose activity has caused the environmental damage or who can otherwise be considered as the operator. The Republic of Palau agrees with both of these statements. The person responsible is a physical or legal person who operates the activity from which the LMOs are discharged, including a person or legal entity from which the goods were imported.

Also, the person who has "the duty to provide information or to obtain approval under the Act"should also be subject to liability. In a situation when LMOs are released unintentionally during transport, the transporters should also be responsible for damages and for taking immediate remedial measures. The transporters should be jointly and severally liable along with the owner or the sender to pay for the costs of remedial measures taken.

If LMOs have been imported into the country, the producer who first placed them on the market and the importer should be jointly and severally liable. The owner of a company or installation that imports such organisms for its own use should be jointly and severally liable with the producer and recourse to persons who have handled such organisms improperly, or have otherwise contributed to the creation or worsening of the harm, should also be held liable. In the case of a multi-person operation, the principle of joint and several liability may be applied under which each liable party is potentially liable for the whole damage, insofar as his/her damage is inseparable from the other.

The Republic of Palau agrees in theory with the concept of joint and several liability. The Republic of Palau follows the "Restatement of Torts" unless specifically excepted by statute or judicial

determination. Presently, there are no specific exceptions to the Restatement of Torts on joint and several liability. Currently the Republic of Palau has no statutory or judicial determinations on the rule defining joint and several liability. However, under the restatement of torts, the general rule is if the separate and independent acts of two or more persons or corporations combine naturally and directly to produce a single indivisible injury, then the actors are joint tortfeasors, jointly and severally liable for the full amount of plaintiff's damages (restatement of torts).

Question 5. What should be the standard of liability for damage resulting from transboundary movements of LMOs, i.e., should it be fault-based, strict or absolute?

The Republic of Palau agrees with the United Nation report that the basic standard to apply to LMO-related activities is strict liability, where liability is engaged regardless of fault.

Question 6. In what circumstances should the liability be exempted where transboundary movements of LMOs have resulted damage?

If a standard for strict liability regimes is enforced, then a limited number of exemptions from liability should be considered. For example, damages caused by military conflicts, civil wars, and terrorist activity.

Question 7. To what extent should a causal link be established between the damage and LMOs?

Proof of causation between damage and activities or liable persons plays an increasingly critical role in a strict liability regime. However, causation may be difficult to establish, in particular in relation to LMOs, because of the complexities of their interact-ions with the receiving environment and the possible timescales involved. To overcome this problem, Austria has adopted the approach of reversal or reduction of the burden of proof, in that causation is presumed until the defendant can demonstrate otherwise. The Austrian Law on Genetic Engineering provides that: "the LMO subject to the contained use or a deliberate release may cause damage, it is presumed that the damage is due to the characteristics of the LMO resulting from the genetic modification. To rebut the presumption the notifier demonstrates the likelihood that the damage is not due to the characteristics of the LMO resulting from the genetic modification (or in combination with other hazardous characteristics of the LMO)." Yet such presumption would be invalid if the damage is likely to have been caused by other properties of these organisms. The Republic of Palau agrees that the Austrian law should be strongly considered as the proper procedure, but in Palau it would require a statutory change to reverse the presumption of guilt. Currently, the Republic of Palau would use the legal standard that liability attaches when causation is "more probably than not" proven. It is more likely that the Republic of Palau would adopt a rebutable presumption standard.

Question 8. Should the liability be limited in time, and if so, to what period?

The Republic of Palau believes the Danish Act on Environmental Damage should be strongly considered, which includes two time-period limitations: three years from the day of knowledge (or should have had knowledge) of the damage (statute of limitation), and a maximum of 30 years counted from the time of the act having caused the damage. This provision would need to be added to existing statutes for Palau to be able to enact this statute of limitations.

Question 9. Should the liability be limited in amount and, if so, to what amount?

The Republic of Palau does not believe there should be a cap on damages.

Question 10. Should financial security be established to compensate for damages resulting from the transboundary movements of LMOs? If so, what should be the appropriate mechanism(s)?

The Republic of Palau in order to guarantee adequate compensation for victims of damage, intends to require the operator to maintain adequate insurance coverage. The Swiss Gene Technology Act requires the proprietors to guarantee their liability through insurance and specify the limits of liability as well as the extent and duration of the guarantee; require the person who guarantees liability to report the existence, suspension or cessation of the guarantee to the enforcement authority, and require the guarantee

to be suspended or ended only after 60 days following receipt of the report. The Republic of Palau agrees with this portion of the Swiss Gene Technology act and plans to include a similar condition in our regulations.

Question 11. Which courts and/or tribunals should have jurisdiction to adjudicate claims for damage resulting from transboundary movements of LMOs?

The Supreme Court of the Republic of Palau.

Question 12. Who should have the right to bring claims on damage resulting from transboundary movements of LMOs?

The Republic of Palau believes that not only should any injured person have the right to bring claims for any and all types of damages, as should all legal and government entities, as well as private organizations if they meet criteria as established by law to document their damages.

ROMANIA [13 JULY 2004]
[ORIGINAL: ENGLISH]

Question 1. What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?

1.1. Activities to be taken into consideration for Romania, when LMOs may have adverse effect on the conservation and sustainable use of the biological diversity:

(a) Transport, transit of living genetically modified microorganisms (LMMOs);

(b) Contained use of the LMMOs, when an accidental release occurs;

(c) Transport, handling, storage, use of living genetically modified organisms (LMOs) for the deliberate release into the environment (living genetically modified seeds);

(d) Transport, handling, storage and use of LMOs intended for food, feed or processing (living genetically modified grains).

To be considered the situations:

(a) Short and long term damage;

(b) Intentional and unintentional.

1.2. Damage to the conservation and sustainable use of biodiversity:

1.2.1. Provisions in the Romanian legislation regarding the "damage", "damage to the biodiversity" and "liability for the prejudice"(related to the obligation of the pollutant to provide for compensation for a damage to the environment):

The Law no 137/1995 on Environmental Protection, republished, modified and completed by Governmental Ordinance no 91/2002:

Definitions:

(a) Biodiversity – means the variability among living organisms from the aquatic and terrestrial eco-systems and of the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems; (This definition is similar to the definition in the

Convention on Biological Diversity, ratified by the Romanian Law no 58/1994: "*The variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems").*

(b) Damaging of environment – means alteration of the physical-chemical and structural characteristics of the environment natural components, the decrease of biological diversity and productivity in natural and human eco-systems, affecting the ecological balance and life quality, mainly because of pollution of water, atmosphere and land, overexploitation of resources, their wrong administration and use, as well as because of an inappropriate territorial planning.

(c) *Prejudice - means the cost quantifiable effect of the damages on human health, welfare, or environment, caused by pollutants, damaging activities, ecological accidents or natural disasters.*

Provisions:

(a) Principles in the Environmental Law:

- *The polluter - pays principle;*
- *The precautionary principle in decision-making;*
- *The prevention of the ecological risks;*
- *The sustainable development of the natural resources, etc;*

(b) The environmental protection shall represent an obligation of natural and legal persons, towards which end they shall bear the costs for the remedy of the prejudice and shall remove the consequences thereof by establishing the conditions existing prior to the occurrence of the prejudice;

(c) Any natural or legal person has the right to address themselves directly or through some organizations to the administrative or court authorities with a view to preventing or in the case a direct or indirect prejudice has happened;

(d) Any natural or legal person has the right to compensation for a prejudice;

(e) The non-governmental organizations have the right to sue in court with regard to environment conservation, no matter who has suffered the offence;

(f) The liability for the prejudice shall have an objective character, irrespective of the guilt. In case of plurality of authors, the liability is joint and several. In case of major - risk generating activities, the insurance for the damages is mandatory.

1.2.2. Provisions concerning liability and redress related to Genetically Modified Organisms in the Law no 214/2002 for the approval of the Government Ordinance No 49/2000 on obtaining, testing, use and commercialization of Genetically Modified Organisms resulting from modern biotechnology as well as the products thereof:

The Law 214/2002 transposes the specific EU legislation (Directive 90/219/EEC, amended by Directive 98/81/EC and Directive 2001/18/EC, repealing Directive 90/220/EEC) and is consistent with the objective of the Cartagena Protocol on Biosafety, ratified by the Law no 59/2003.

The Law regulates all the activities: import, obtaining, testing, use and placing on the market of the Genetically Modified Organisms and contained use of Genetically Modified MicroOrganisms.

According to the Law, the operator is liable for the damage to the human and animal's health, to the biological diversity and environment as a whole.

The nature and amplitude of the damage, when occurs, are established by a Commission of experts, appointed by the leadership of the Ministry of Environment and Water Management.

The remedial measures, set by the Commission, are communicated to the operator through a Ministerial Order of the Ministry of Environment and Water Management. Against such an Order, the

interested person could formulate a complaint to the administrative contentious court, in the legal conditions.

When at the origin of the damage is the import for using on the national territory of a GMOs or of the products thereof, are applied the provisions of the international legal acts regulating the transboundary movement of the GMOs and/or products thereof, signed by Romania.

Until now, no such a situation occurred.

1.2.3. Views regarding the concept of "damage resulting from the transboundary movements of LMOs":

(a) Regarding the "damage resulting from the transboundary movements of LMOs", we consider that it should include, not only the damage to the biodiversity, but also the damage to the human and animal health, and the economic damage.

(b) Regarding the damage to the biodiversity:

The negative effects to biodiversity could occur directly or indirectly by:

- Spreading of LMOs in the environment, when LMOs may became persistent and invade the natural habitats;
- Transferring of the inserted genetic material to other species or to the same type of organisms, genetically unmodified;
- Interacting with other organisms, i.e. impact on the complex relations that are set at the biocenosis level;

(***c) For defining, in a scientific manner, the damage to the biodiversity, we suggest to use the criteria taken into consideration in the Risk assessment:***

- Interaction with and effects on the populations' dynamic of the existing species in the receiving environment;
- Effects on the genetic diversity of each of these populations;
- Effects on the biogeochemical circuits, especially for the carbon and nitrogen circuits.

We appreciate as necessary to be considered a direct or indirect damage, which can occur immediately or in delay.

For example, according to the Law no 214/2002, annex 12, ***the Criteria to be taken into consideration for the genetically modified superior plants (GMHP), in assessing a potential damage to the biodiversity, are the following:***

"1. The persistence in the agricultural systems, when the GMHP invasive capacity becomes bigger than of the parental or receiving plants;

2. The genes transfer possibility to the same variety of plants or to other sexually compatible varieties of plants in the conditions accepted for cultivating these GMHP and if this transfer confers to the plants any kind of selective advantage or disadvantage;

3. Direct and indirect interactions between the GMHP and the organisms-target such as prey beings, parasites and/or pathogens (immediately and/or by delay);

4. Direct and indirect interactions between the GMHP and the organisms-non-target considering likewise the organisms interacting with the organisms-target, including the impact at competitors' population level, the herbivores, simbionts, parasites and/or pathogens; (immediately and/or by delay);

5. Possible negative effects on the biogeochemical processes, which might occur immediately and/or by delay, following the possible direct and indirect interactions between the GMHP and the species-target and non-target in the vicinity of the site where these are introduced".

Question 2. What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

All the activities: Transport, transit, handling, storage and use, intentional and unintentional. The same, the situation of an irreversible damage, too.

Question 3. How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation and classification of damage within the framework of Article 14 paragraph 2, of the Convention on Biological Diversity?

Both Protocol and the Convention ask for the necessity to identify and evaluate the damage to the biological diversity, for establishing the liability and remedial measures.

Art. 27 of the Protocol is concerned with the specific damage to the biodiversity and human health, due to LMOs.

Question 4. To whom should liability for damage resulting from transboundary movements of LMOs be channeled?

We appreciate that the liability should be channeled, as is the case:

(a) To the person(s) who was (were) in the position to prevent the damage: exporter, notifier or operator, function of the step in the process of transboundary movement;

(b) To the notifier (exporter), for incorrect or incomplete information and/or to the author of the risk-assessment study or monitoring, for wrong or incomplete information;

(c) To illegal trafficker or the to origin State of export, in the case of the illegal transboundary movement.

Question 5. What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?

The standard of liability for this damage should be fault-base (including negligence).

Question 6. Should there be any exemptions from liability? If so, under what circumstances?

In the cases of *"force majeure"* or "acts of God"(armed conflicts, terrorism, or other acts of a similar nature, which are beyond the control of the involved parties).

Question 7. Should the liability be limited in time and, if so, to what period?

The effects of LMOs might be observed only over a long period of time after the shipment took place, so we propose to be not limited in time, in some cases, when they have significant consequences. In such cases, it will be difficult to apply the liability regime, so the remedial measures could come in the State responsibility. The public should be informed, accordingly.

Finally, to be established by the Technical Group.

Question 8. Should the liability be limited in amount and, if so, to what amount?

To be established by the Technical Group, in connection with the aspects of insurance or international environmental or health funds.

Question 9. How would judgments given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?

To be established by the Technical Group.

Question 10. What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

We appreciate that the aspects related to liability and compensations have to be solved under the legislation of the State where has been produced the damage. If unsuccessful, the final verdict will belong to an International Court of Arbitration.

We propose to be taken into consideration the mechanism provided by the Art. 27 of the Convention on Biological Diversity:

- Arbitration in accordance with the procedure laid down in part 1 of annex II;
- Submission of the dispute to the International Court of Justice.

Question 11. What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

Regarding **State responsibility** in a liability and redress regime:

(a) For not taking the appropriate measures to create the national legislative and institutional framework for LMOs;

(b) For not applying the provisions of the international treaties or accords, already signed, regarding transboundary movements of LMOs.

Regarding **State liability** in a liability and redress regime:

(a) For not informing the affected or potentially affected States, to enable them to determine appropriate responses and initiate necessary action, including emergency measures, for preventing significant adverse effects on the conservation and sustainable use of biological diversity, and also to human health;

(b) For not taking the appropriate measures (as origin State of export) for stopping illegal transboundary movements of LMOs;

(c) For not taking the initiative to apply remedial measures, in the cases when the damage is established after a long period of time and the liable person is not identified;

According to the Romanian Law no 214/2002:

> *Art. 42(1) In the case of illegal traffic, the competent authorities will ask the origin State of export to transport back the LMOs, on its own expenses, according to the provisions of the international law.*
>
> *(2) The illegal traffic cases will be notified to the relevant international organizations, according to the rules in the international law in this field.*

Question 12. Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

(a) The injured natural or legal persons or likely to be affected by a damage to the biodiversity, health or economic damage;

(b) The damaged State (s), when is the case;

(c) A national or international environmental NGO;

PROPOSALS for the Working Group activity:

(a) To be developed basic principles and methods for quantifying the damage to the conservation and sustainable use of the biological diversity;

(b) To be considered the situation of incorrect or incomplete information related to the results of the the risk – assessment in decision making process and regarding the results of the monitoring process;

(c) To be considered the damage to the human and animal health, in direct relationship with the damage to the biodiversity and economic damages;

(d) To be covered the situation of an existing national legislation (or regional, as in European Union), governing transboundary movements.

(e) To be analyzed the intentional aspect of the actions conducing to damage to the biological diversity and human health of a country or a region, in the transboundary movements of LMOs;

(f) The be considered the situation of an irreversible damage to the biodiversity and human and animal health.

SAINT LUCIA [20 JULY 2004]
[ORIGINAL: ENGLISH]

1. The types of activities covered under the Protocol that are perceived as most likely to cause damage in this country are unregulated, unmonitored use, deliberate and accidental release and introduction of LMOs/GMOs.

The biggest problem can also reside with LMOs for intentional release into the environment. In small island developing States (SIDS) like this country, where proper inventories of biological diversity may not exist, a proper assessment of risk may not be possible prior to the actual introduction of LMOs into the environment. Also LMOs intransit and those destined for food, feed and/or processing should require the same procedure as those destined for release into the environment, especially in the absence of a clearly defined policy on liability and redress, the dangers posed by these for small island States are only too grave.

The criteria that are helpful in assessing damage to biodiversity resulting from transboundary movement of LMOs should include population studies, ecology, agri-food chain, GMOs consumed as feed, labeling.

The island should enact legislation making prior informed concent (PIC) a prerequisite for the transboundary movement of LMOs. If this is not adhered to then an appropriate liability and compensation regime will kick in.

2. The types of activities or situations that should be covered under the international rules and procedures referred to in Article 27 of the Protocol include intransit release, LMOs causing genetic erosion of local species (species endemic to the country), contamination of food, breeding lines and side effects from consumption.

An important question to be considered is whether transboundary movement of LMOs applies only to intentional shipments. Would liability also be relevant for accidental shipments? And in the case of accidental shipments, the issue of chain of responsibility becomes important - the importer, exporter and shipping agent/captain. These will all have to be considered in the liability regime. Another question arises if this country is only a transit State for the movement of LMOs.

In the transboundary movement of any LMO, by whatever means the owner of the facility from which it originated from will remain culpable until the end of its life.

The issue of monitoring compliance should also be reflected in that area.

3. "Damage resulting from transboundary movements of LMOs" should be defined, valued and classified differently to the framework of Article 14 paragraph 2 of the Convention on Biological Diversity to include damage and compensation for risks to human health.

The concept of damage should be defined, looked at on a case-by-case basis in a scientifically sound manner and based on the findings, classifications will be made (biosafety levels can be articulated). The biosafety levels can be defined and articulated based on threal levels that a GMO/LMO possesses.

4. The liability claims should be chanelled to an internationally established liability and redress panel unless it is an internal matter. There should be a question which seeks to provide information on the procedure that a country must use in seeking redress. There should also be a question that seeks to provide information on a framework for developing countries to seek redress, given their limited resources (e.g. resources to prove damage, to obtain information on the source of damage).

This panel should have representatives from underdeveloped countries and small island States. In the English speaking Caribbean the University of the West Indies should get involved in this aspect.

5. This depends on the situation. Guidelines should be established for various scenarios. Perhaps all parties to the liability situation should be held liable including the State, the seller and the buyer.

The other question arises is that if a country voluntarily agrees to the use of LMOs, does it also accept the liability for any damage that may be caused? The issue of direct cause and effect may be a difficult one. Will there be mechanisms that will enable some sort of independent assessment/assessment that could be defended under a liability system?

There should be an exemption that if someone/traveler smuggled in a restricted-use GMO, the country/party producing the GMO should not be held liable. Also if contained use LMOs were released into the environment due to an unforeseen or unexpected disaster e.g. natural - that would not have been foreseen under normal circumstances. However the Party likely to suffer damage should anticipate this and put mechanisms in place to minimize smuggling and other forms of entry which does not have PIC. For a State to get any exemption it must show the incident occurred despite the fact that the best practable means to avoid it are in place.

Standards should be set taking into account all possible ramifications perceived, however, legal latitude has to be made available to deal with unforeseen or new situations out of LMO use and movements.

6. Yes, the liability can be limited in time as that depends on the LMO and the biological history of the species that may be affected. On the other hand, the liability should not be limited in time, since side-effects can manifest decades after.

7. The liability should not be limited in amount but should be dealt with on a case-by-case basis within a minimum to a maximum range.

Given the novelty of this technology, no limitations on time should be imposed especially when SIDS are involved. An LMO may have deleterious effects which are detected many years afterwards.

8. Does this question also deal with what holds if a country is not satisfied with the degree to which it is compensated for damage?

Is it the panel who will determine the amount of the liability?

These judgements should be executed through an international body. Perhaps the Secretariat of the Convention on Biodiversity should enforce judgements. Not sure whether that could be possible.

The panel should be the dispute resolution arm of the Convention and the text of the Convention amended there by giving the Convention the authority to enforce judgements.

For St. Lucia, national legislation would guide regulations and maybe an international regime could be adopted that would assist the liability and redress conunittee.

9. The issue of procedure in the event that there are disputes pertaining to liability would need to be articulated. Who would be responsible for final arbitration? What will be the procedure for appeals etc? Does this question also deal with what would hold, if a country is not satisfied with the degree to which it is compensated for damage?

The relevance of arbitration in settling disputes would be very relevant if internationally recognized and accepted guidelines are established for a liability and redress committee. This committee can recommend measures to settle disputes and serve as an arbitrator.

It ensures that adequate research is carried out on LMOs, that clear and efficient monitoring and evaluation occur at country levels and ensures that national authorities and focal points are truly competent.

10. Since the State allows or makes provision for the importation of LMOs, it should be held partially liable.

In many cases, it is institutions that develop LMOs etc and as such the State should not be held responsible since it has established standards which would not discriminate on instate vs. out of state.

The developer should be ultimately responsible.

If a country voluntarily agrees to the use of LMOs, does it also accept the liability for any damage that may be caused?

A competent body should be formed for that purpose, mandated to arbitrate disputes regarding transboundary movements of LMOs.

11. Consumer rights associations, the State and individuals can make claims for damage resulting from transboundary movements of LMOs. Affected communities, or agencies can apply to the State and the State as a party to the Protocol can make representation on their behalf.

Given the nature of LMOs, the State should be responsible for imposing safety regimes. Also the issue of monitoring and compliance is of paramount importance to ensure adequate safety levels consequently damages resulting from LMOs should in part be a responsibility of the State.

The State, affected individuals etc, should have the right to make claims for damage resulting from transboundary movements of LMOs.

SLOVENIA [29 JUNE 2004]
[ORIGINAL: ENGLISH]

1. In compliance with the Slovenian *Management of Genetically Modified Organisms Act (OJ 67/2002)* the general principles are helpful in preventing the consequence likely to caused damage to environment resulting from management of GMOs;

A) *Principle of liability (art.3, para 7)*

A legal or natural person, who performs use of GMOs, is criminally liable and liable to damages in compliance with the Act in event of damage resulting from their GMOs management.

B) *Principle of the causer pays (art.3, para 8)*

A legal or natural person, who performs use with GMOs, is criminally liable and liable for damages in compliance with the Act in the event of damage resulting from their GMO management.

C) *Principle of compulsory subsidiary measures (art 3, para.9)*

The State must guarantee measures for reducing or preventing the consequences of adverse effects resulting from management of GMOs, if the legal or natural person is not identifiable or if the consequence cannot otherwise be reduced or prevented, in compliance with the Act. If in the natural or the legal person is subsequently identified, the State has the right and duty to claim from such a person reimbursement of the costs of reducing or preventing the consequence.

Based on the Slovenian Conservation Act (OJ 42/2004) classification of harm on biological diversity based on the IUCN (International Union for Conservation of Nature) this is confirmed by the red lists.

Therewith, the significant adverse changes should be determined by means of measurable data such as the number of individuals, their density or area covered, the role of particular individuals or of the damaged area in relation to the species or to the habitat conservation, the species' or habitat capacity, after damage has occurred, to recover within a short time, without any intervention other than increased protection measures, to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.

Damage with a proven effect on human health must be classified as significant damage.

2. Activities referred to in Art.27 of the Protocol should include current trends in international environmental law focus on preventing rather than remedying damage. In addition, each State shall take appropriate measures, under its jurisdiction, to prevent unintentional transboundary movements of GMOs, and as soon as a State becomes aware of an occurrence resulting in a release of GMOs that leads, or may lead, to unintentional transboundary movements that is likely to have a significant adverse effects on the conservation and sustainable use of biological diversity, taking into account risk to human health, as well.

3. There is a need to identify and promote synergies and cross fertilization between the two processes such as Art.14(2) of the Convention on Biological Diversity addresses damage to biological diversity and Art.27 of the Protocol.

However, the concept of "damage resulting from transboundary movements of LMOs" may be defined as an accident or series of incidents when during transboundary movements of LMOs, an unintended release of LMOs into the environment occurs which could present an immediate or delay hazard to human health and damage to biological diversity.

4. For channelling of liability for damage resulting from transboundary movements of LMOs the operator, a third party who caused damage or imminent threat of damage, would be liable for damage.

5. Due to the fact that strict liability imposes an obligation of result, it could be used as a standard of liability for damage resulting from transboundary movements of LMOs.

6. Examples to be considered may include; an act of armed conflict, a natural phenomenon of exceptional and irresistible, and where an act of a third party has caused the damage question.

7. For example; the State (competent authority) shall be entitled the liability (costs) to the operator, or if appropriate, a third party who caused damage or the imminent threat of damage in relation to any measures taken within five years from the date on which those measures have been completed or the liable operator, or third party, has been identified, whichever is the later.

8. It may not be the appropriate to impose a ceiling on the amount of liability under rules and procedure. But, the liability shall include also costs of assessing environmental damage, an imminent threat of such damage, alternatives for action as well as the administrative legal and enforcement costs, monitoring and supervision costs.

9. If any provision should mutual recognized and enforced of judgements of courts of one country to another?

10. The appropriate elaboration of international rules and procedure in the field of liability and redress for damage resulting from transbounadry movements of GMOs should be agreed. Anyhow, what

provision should be made for judgments of courts of one country to be recognized and enforced in other countries?

11. The notion of State liability and State responsibility would serve as a principle to establish a framework whereby environmental damage would be prevented or remedied through a system of environmental liability.

12. For example, natural or legal person affected or likely to be affected by environmental damage, or having a sufficient interest in environmental decision-making relating to the damage.

SRI LANKA [9 JULY 2004]

[ORIGINAL: ENGLISH]

1. Type of activities or situations perceived as most likely to cause damage in the country and kind of criteria helpful in assessing damage to biodiversity.

Importation, transit and release of LMOs, GMOs and products can cause damage. Criteria are:

(a) Generation/spread of invasive species;

(b) Reduction in indigenous/local varieties/species;

(c) Toxic conditions;

(d) Contamination;

(e) Gene transfer.

2. Types activities or situations that should be covered under the international rules and procedures.

A suitable regime should be in place to address the potential problems and implications arising out of not only LMOs but all types of GMOs and products. This should include importation, transit that is transboundary movements and release.

3. Concept of "damage resulting from the transboundary movements of LMOs".

This should not confine only to LMOs but to all types of GMOs and products.

This should include importation, transit that is transboundary movements and release as well.

Article 14(2) of the Convention on Biological Diversity addresses the damage to biological diversity. In the Protocol it should consider damage to biological diversity and health as well.

4. Liability should be channelled to:

Party of import, at times party of export, and the operator/shipper - person with operational control of the LMOs

5. Standard of liability: strict or fault based?

Strict liability

6. Exemptions from liability.

7. Liability, limited in time?

Should not be limited in time.

8. Liability, limited in amount?

Should not be limited to an amount.

9. Judgements to be given?

Not known

10. Relevance of arbitration.

Possible

11. Notion of State liability and State responsibility.

Not known

12. Right to make claims.

Any Party incurring to damage and the Government.

SWITZERLAND [8 JULY 2004]

[ORIGINAL: ENGLISH]

Question 1: What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movement of LMOs?

The following types of activities are perceived as most likely to cause damage in our country are:

(a) Marketed use of LMOs (seed, food products);

(b) Field trials with LMOs for experimental purposes;

(c) The contained use of LMOs.

Considering these activities damages resulting from the intentional and from the unintentional transboundary movement of LMOs have to be taken into account.

Switzerland has not yet elaborated criteria which are helpful in assessing damage to biodiversity. However we think that the elaboration of such criteria would be a very useful work not only for the purpose of liability under the Cartagena Protocol. Such an important task could be integrated in the work plan of the Convention on Biological Diversity.

Question 2: What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

The types of activities mentioned under question 1 should be covered as far as these activities are performed in a transboundary context.

Question 3: How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation and classification of damage within the framework of article 14 paragraph 2, of the Convention on Biological diversity?

The concept "damage resulting from transboundary movements of LMOs" should contain:

(a) Loss of life or personal injury;

(b) Loss of or damage to property;

(c) Loss of income directly deriving from an economic interest in any use of environment (including biodiversity), incurred as a result of impairment of the environment (including biodiversity;)

(d) The cost of measures of reinstatement of the environment.

This concept of damage is different from the concept mentioned in Article 14.2 of the Convention as it includes loss of life or personal injury as well as loss or damage of property.

Question 4: To whom should liability for damage resulting from transboundary movements of LMOs be channelled?

When we consider transboundary movements of LMOs we mainly distinguish between the following types of activity:

(a) Contained use of LMOs;

(b) Release of LMOs for experimental purposes (field trial);

(c) Use of marketed LMOs.

Considering these activities damages resulting from the intentional and from the unintentional transboundary movement of LMOs have to be taken into account.

For the first two types of activity (contained use, field trials) the liability should be channelled to the operator.

For the third type (marketed LMOs) as a principle the liability should be channelled to the producer/exporter of the original LMOs (e.g. the seed producer) with a right of recourse against the negligent or careless user.

Question 5: What should be the standard of liability for damage resulting from transboundary movements of LMOs? Should it be fault based, strict or absolute?

It should be strict liability.

Question 6: Should there be any exemptions from liability? If so under what circumstances?

The standard clauses of exoneration as e.g. when the damage was the result of the wrongful intentional conduct of a third party, including the person who suffered the damage should be applicable.

Question 7: Should the liability be limited in time and, if so, to what period?

The time limit of liability should be 30 years from the date of the incident and 3 years from the date the claimant knew of the damage.

Question 8: Should the liability be limited in amount and, if so, to what amount?

It should be limited in amount. The exact amount should be negotiated together with representatives of the insurance sector. This allows elaborating a realistic instrument.

Question 9: How would judgments given pertaining liability and redress be recognized or enforced in another country/jurisdiction?

The international rules and procedures to be elaborated by the Parties must include a provision on mutual recognition and enforcement of judgements.

Question 10: What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

The possibility of arbitration between the person liable and the claimant in principle should be granted. This could allow resolving a case in a more cost-effective manner.

Question 11: What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

With the notion of State liability the rules and procedures would indicate that liability would also apply in cases where the State is owner or operator of a relevant activity.

Under the notion of State responsibility the rules and procedures will establish the conditions and the limits under which States can be made responsible for damages caused by incidents occurring within their territories

Question 12: Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

Any individuals who have suffered a damage resulting from transboundary movements of LMOs.

Domestic Law must indicate who will be entitled to take measures of reinstatement of the damaged environment. These people or entities should then have the right to make claims.

TOGO [30 JUNE 2004]
[ORIGINAL: FRENCH]

Donner une réponse satisfaisante à ce questionnaire n'est pas évidente à la phase actuelle de la réflexion sur les régimes de responsabilité en matière de dommages résultant des mouvements transfrontières des OVM. Le champ d'application de l'article 27 du Protocole de Cartagena se limite aux mouvements transfrontières des OVM. Son interprétation semble être préalablement délimitée par l'article 14(2) de la Convention sur la Diversité Biologique qui ne couvre que les dommages à la Diversité Biologique. Tout dépendra de la volonté des Parties au Protocole. Elles sont appelées à déterminer au cours des prochaines réunions un champ d'application qui prend en compte tous les domaines que touche la biosécurité.

Les activités ou situations perçues comme cause des dommages:

(a) Contaminations de la biodiversité résultant des mouvements transfrontières (origine accidentelle ou criminelle);

(b) Dissémination des OVM au-delà des zones autorisées;

(c) Fuites de gènes résultant des activités de laboratoire;

(d) Consommation des OVM ou produits dérivés entraînant des dommages pour la santé humaine;

(e) Consommation des OVM ou produits dérivés entraînant des dommages pour la santé animale;

(f) Introduction des OVM dans un milieu donné (région, pays) entraînant des dommages socio-économiques et/ou culturels: nuisances et dommages causés directement ou indirectement à l'économie, aux conditions sociales ou culturelles (dérèglement des systèmes économiques et agraires ou valeurs culturelles d'un pays d'un peuple…);

(g) Les opérations de dons à base d'aliments transgéniques réalisées par une ou plusieurs Parties, des ONG, des institutions onusiennes;

(h) Mise en vente d'OVM et des produits dérivés dans un pays (importateur) par une autre Partie (exportatrice);

(i) Les introductions d'OVM dans un pays sans autorisation;

(j) Etc.

Critères d'évaluation des dommages: l'évaluation sera fondée essentiellement sur la valeur réelle des préjudices subis. S'agissant spécifiquement des dommages à la biodiversité, l'évaluation dépendra de la valeur estimative définie en fonction de l'importance de celle-ci pour le pays ou les communautés locales. Les préjudices aux valeurs culturelles seront déterminés en fonction du rôle de ces valeurs pour les communautés locales.

Les activités ou les situations qui devraient être couvertes par les instruments juridiques internationaux:

(a) Contaminations de la biodiversité résultant des mouvements transfrontières (origine accidentelle ou criminelle);

(b) Mise en vente par une multinationale des OVM et des produits dérivés entraînant des dommages pour la santé humaine ou animale;

(c) Introduction des OVM dans un milieu donné (région, pays) entraînant des dommages socio-économiques et/ou culturels: nuisances et dommages causés directement ou indirectement à l'économie, aux conditions sociales ou culturelles (dérèglement des systèmes économiques et agraires ou valeurs culturelles d'un pays d'un peuple…);

(d) Les opérations de dons à base d'aliments transgéniques réalisées par une ou plusieurs Parties, des ONG, des institutions onusiennes;

(e) Les introductions d'OVM dans un pays sans autorisation;

(f) Etc.

Le concept de dommages résultant des mouvements transfrontières des OVM ne devra pas se limiter aux conditions retenues en application de l'article 14(2) de la Convention sur la Diversité Biologique.

Selon le cas, la Partie exportatrice, la Partie importatrice, l'exportateur, l'importateur, l'auteur de la notification ou l'auteur de l'acte dommageable peut/peuvent être déclaré(s) responsable(s) des dommages résultant des OVM.

Dans les systèmes juridiques francophones, le Droit Administratif (Droit Public) a permis de définir un régime de responsabilité sans faute (responsabilité objective) applicable généralement lorsque l'intérêt général est en jeu. L'adoption de ce régime dans le cadre de la biosécurité serait très appropriée.

Seuls les cas de force majeure pourront servir de causes d'exonération. Il reviendra au présumé responsable d'apporter la preuve de l'existence de force majeure lors de la réalisation de l'événement dommageable. Exceptionnellement, le respect des règlements pourrait être pris en compte.

Une extinction décennale (10 ans à partir de la prise de conscience du/des dommage(s) pourrait être appliquée dans le cadre des dommages liés aux OVM.

La réparation ne devrait pas être plafonnée à un montant fixe. Elle sera définie en fonction de l'importance des préjudices.

Les Parties doivent prendre des mesures qui rendent exécutoires les décisions de justice rendues dans les Etats Parties.

L'arbitrage devra être utilisé comme dans les instruments juridiques internationaux en vigueur. Cette phase n'interviendrait que lorsque les Parties ne sont pas arrivées à une résolution à l'amiable de leur litige. La durée des procédures d'arbitrage devra être réduite;

La responsabilité de l'Etat Partie peut être engagée à deux niveaux:

(a) Premièrement en tant qu'exportateur;

(b) Deuxièmement en tant que Partie n'ayant pas respecté ou fait respecté les obligations relatives au Protocole de Cartagena;

Peuvent réclamer des réparations:

(c) Toute personne: personne physique, personne morale (entreprise, Etat, Collectivité locale…)

(d) Groupe de personnes: populations locales, autochtones…);

(e) Organisation privée ou publique: ONG, Association…).

Autres éléments importants:

1. Les exportateurs, importateurs, usagers ou opérateurs d'OVM seront tenus de souscrire à une police d'assurance au titre de garantie financière pour la réparation d'éventuels dommages.

2. Le problème de compétence territoriale des institutions judiciaires devra être également réglé: il serait approprié que se soient les institutions judiciaires des pays où le/les dommages se sont produits qui soient reconnues compétentes.

En outre certains instruments internationaux pourront servir de documents base dan la définition des régimes de responsabilité en matière de dommages résultant des mouvements transfrontières d'OVM. Il s'agit notamment de:

(a) Convention de 19972 sur la responsabilité internationale pour les dommages causés par les objets spatiaux;

(b) Convention de Paris de 1960 sur la responsabilité civile dans le domaine de l'énergie nucléaire et instruments connexes;

(c) Convention de 1969 sur la responsabilité civile pour les dommages dus à la pollution par les hydrocarbures et instruments connexes;

(d) Le projet de Protocole de Bâle sur la responsabilité et l'indemnisation en cas de dommages résultant de mouvements transfrontières et de l'élimination de déchets dangereux;

(e) Projet de Convention de 2001 sur la responsabilité civile pour les dommages dus à la pollution par les hydrocarbures en soute.

UGANDA [28 JUNE 2004]
[ORIGINAL: ENGLISH]

Question 1.

A. Types of activities or situations perceived as most likely to cause damage:

(a) Transportation and Handling between and within countries;

(i) Accidents – breakage of containers;

(ii) Theft – LMOs ending up in wrong hands and wrong intended destinations;

(iii) Failure to comply with prescribed measures/procedures including on labeling, packaging etc.;

(iv) Transfer from one container packaging to another leading to escape.

(b) Use

(i) Environmental releases – LMOs behaving contrary to earlier expectations either due to difference in environment conditions and causing harm to biodiversty or human health our new evidence resulting from better;

(ii) Experimental/contained use;

- Due to the supply of insufficient information, an LMO is handled under inadequate safety measures leading to harm;
- Applicants' negligence of safety precautions, where they were otherwise provided;
- Escape of LMOs or parts thereof during Field trials/testing
- Theft of LMOs under contained use including field trials and other experiments.

(iii) Consumption and related activities.

(c) Direct consumption through feeding on LMOs and their products containing DNA or medication with LMO pharmaceuticals.

(d) Indirect consumption e.g. inhalation or physical contact of transgenic organisms leading to allergy, or other harm.

B. Criteria helpful in assessing damage to biodiversity:

(a) Genetic erosion or exhibition and/or variation within originally non-transgenic species;

(b) Ecological imbalance/instability;

(c) Impaired productivity of crops, livestock or soils.

Question 2.

All activities mentioned under Q/1/A above should be covered under the international rules.

Question 3.

The concept of damage should include the aspects of valuation and classification of damage within the framework of Art. 14.2 of the Convention on Biological Diversity, but limited to the provisions of Art. 14.2 in that the scope of the Cartagena Protocol on Biosafety includes human health and socio-economic considerations, which should as well be covered by the international regime on liability and redress. The Ugandan National Environment Act provides for compensation, restoration and injunction remedies against harm to the environment, biological diversity and human livelihoods.

Question 4.

Liability for damage should be channeled to any or all of the following as appropriate:

(a) The person whose actions who led to the damage/harm;

(b) The owner/patent holder of the LMO that caused the harm;

(c) The importer and/or exporter of the LMO as appropriate;

(d) The supplier of the LMO in question;

(e) The Party or State of export.

Question 5.

The standard of liability or damage should be strict liability.

Question 6.

There should be no exemptions to the provisions under the liability regime, save for defenses allowed under strict liability such as natural calamities, acts of third parties etc.

Question 7.

Liability should not be limited in time, as long as it can be linked to the cause.

Question 8.

Liability should not be limited in amount, since the level of harm is difficult to estimate in advance.

Question 9.

Inducements given pertaining to liability and redress should be recognized or enforced in another country/jurisdiction in two ways, depending on whether the countries in questions are both Parties to the Cartagena Protocol on Biosafety or one is and the other is not.

(a) For parties to the Cartagena Protocol on Biosafety who are also Parties to the New York Convention on Enforcement of Foreign Judgments (1959), it will be in accordance with the provisions of that Convention.

(b) Where one of the parties is not Party to the Cartagena Protocol on Biosafety or the New York Convention, it will be as specified in their bilateral agreement.

Question 10.

Arbitration would be of relevance in that it is cost effective, non-adversarial, expeditious and allows both Parties to choose the appropriate arbitrator. This leads to better chances of future cooperation between would-be adversaries and hence better compliance with the processes of the Protocol. Moreover in case of disagreement, or non compliance with the arbitral award the option of going to court is still open.

11. The notion of State liability and State responsibility would help in enforcement/ensuring compliance with the regime in that, States would require persons under their jurisdictions to comply with the provisions and in case of compensation where the liable person has ceased to exist or ran bankrupt, the State would be held liable. This would ensure that the aggrieved party does not lose out.

12. The right to make claims should rest in Parties, States organizations or individuals affected by or concerned about the damage.

UNITED STATES OF AMERICA

[25 SEPTEMBER 2003]
[ORIGINAL: ENGLISH]

Introductory comments

The United States notes that the mandate for Article 27 focuses the first Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety on adopting a process for the appropriate elaboration of international rules and procedures on liability in this area. The substance of the questions posed extends well beyond the issue of the process that the Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety should adopt and, as such, should not be taken up until such process has been established. Nonetheless, the United States will offer initial reactions to the questions at this time.

As part of the Article 27 process, participants should keep in mind the importance of capacity-building projects to help countries develop risk assessment procedures to evaluate the potential adverse effects of LMOs on conservation and sustainable use of biological diversity so that harm may be prevented.

A general point not addressed by the questions is that those considering whether and, if so, how to elaborate international rules and procedures should consider the availability of insurance to cover the damage resulting from transboundary movements of LMOs.

Also, any international rules and procedures that may be developed under Article 27 must reflect, and not disturb or distort, the Protocol's balance struck between the respective responsibilities of the exporter and importer.

Accordingly, liability should not flow from activities that are authorized by, or otherwise consistent with, the Protocol (noting, in this regard, the last three paragraphs of the preamble, "the savings clause.")

There are additional questions that should be considered in connection with those below:

(a) In addition to promoting capacity-building, what other means should Parties consider to avoid harm to biological diversity resulting from transboundary movements of LMOs?

(b) Assuming realistic scenarios of concern are identified, are they amenable to redress through existing national liability regimes or through national liability regimes that could be developed even if they do not now exist?

(c) Would an international liability regime be exclusive, default, or supplemental to other mechanisms?

(d) Should the liability system also take into account whether, and the extent to which, transboundary movements of LMOs might reduce other harms to biological diversity (e.g. LMOs that allow reduced use of pesticides)?

Question 1. What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?

While not anticipating damage in the United States from activities and situations covered under the Protocol, the United States is interested in the perceptions of other countries concerning types of activities/situations likely to cause damage in their countries.

The question's use of the word "perceived" is appropriate, as a critical element of the process established under Article 27 will be to evaluate reported perceptions from a scientific point of view.

To the extent a perceived activity or situation was found to have a scientific basis, it would then need to be considered whether such scenario is any more likely to occur than a scenario not involving LMOs and, further, whether such scenario is covered by existing legal mechanisms.

The importance of scientific analysis at the early stage of identifying real risks to the conservation and sustainable use of biological diversity cannot be overemphasized. While international law developments should, of course, be analyzed and taken into account, it would be unfortunate if the process were to hastily apply international liability models from other fields that, from a scientific point of view, are not analogous to this one.

With respect to criteria, please see the answer to question three below on definition of biological diversity.

Question 2. What type of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

Assuming, arguendo, that international rules and procedures will be called for, the Protocol is clear on the scope of such rules and procedures.

Specifically, under Article 27, any elaboration of international rules and procedures in this area would be limited to redress for damage resulting from the actual "transboundary movement" of LMOs. Whereas the Protocol itself focuses on a broader range of activities, including not only the transboundary movement, but also the transit, handling and use of LMOs (Article 4), Article 27 was written to cover only transboundary movements. Such a movement is defined in Article 3(k) as the "movement of a LMO from one Party to another Party." Any Article 27 international rules and procedures will need to specify

the actual parameters of what constitutes damage "resulting from" a transboundary movement so that exporters and importers may have legal certainty regarding the scope of this term and to avoid a multitude of disparate interpretations.

Question 3. How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation and classification of damage within the framework of Article 14 paragraph 2, of the Convention on Biological Diversity?

Article 27 itself does not specify the type or threshold of "damage" from transboundary movements of LMOs that it intends to address.

Concerning the type of damage, the United States considers that the interpretation of the term should be informed by the scope of the Protocol in Article 4 and the objective of the Protocol in Article 1. As such, damage in Article 27 refers to the effect of the transboundary movement of the LMO on the conservation and sustainable use of biological diversity. It would not include, for example, socio-economic harm.

(a) Taking the definition of "biological diversity" from the Convention on Biological Diversity as a reference point, biological diversity may be assessed in terms of variability. Thus, "damage" under Article 27 would not be understood merely as a change in biological diversity; rather, it would need to include at least the elements that there be a significant and measurable change in variability and that such change be negative. It would seem essential that there be established, verified benchmarks with which to measure any claimed damage. Further, the issue of proximate cause would need to be analyzed and addressed, so that it is clear to both potential claimants and defendants how close the connection must be between the initial transboundary movement and the claimed harm.

Concerning the damage threshold, Article 27 should address impacts on the conservation and sustainable use of biological diversity that rise above a de minimis level of significance, at least those that are "significant" or "substantial" and "measurable."

We are interested in learning of any specific examples of damage to biological diversity that would be covered by any international rules and procedures that may be developed under Article 27.

Question 4. To whom should liability for damage resulting from transboundary movements of LMOs be channeled?

It is premature to comment on the channelling of liability, given that the Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety has yet to even establish the process that will consider the necessity and appropriateness of elaborating international rules and procedures regarding liability on this topic.

It should be noted, however, that any international rules and procedures developed under Article 27 must reflect, and not disturb or distort, the Protocol's balance struck between the respective responsibilities of the exporter and the importer throughout the process of the transboundary movement of LMOs.

Question 5. What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?

As with channeling, it is premature to comment on what the substantive standard of liability should be for a regime when we are only at the stage of establishing the process to consider the issue.

We would note at this point that, both domestically and internationally, absolute liability is extremely rare, and strict liability is ordinarily reserved for hazardous activities (which would not include transboundary movements of LMOs).

We would also note that it would seem that a fault-based standard would be most appropriate in this context. A fault-based standard makes sense in that liability should only be imposed for activities that are inconsistent with the obligations imposed by the Protocol or are otherwise inconsistent with the specified standard of care (e.g. negligence, gross negligence etc.)

Question 6. Should there be any exemptions from liability? If so, under what circumstances?

Again, it is premature to comment on the substantive issue of liability exemptions with respect to the topic at hand at this stage.

One could note generally that international regimes do generally include exemptions from liability, for example, with respect to armed conflict, acts of terrorism, force majeure, and third party intervention.

Also, as noted above, it is clear that no liability should be imposed for activities taken in accordance with the Protocol. We would not view this as an exemption from liability, but rather a circumstance in which liability would never be considered in the first place.

Question 7. Should the liability be limited in time and, if so, to what period?

- As noted above, the parameters of what constitutes damage "resulting from" a transboundary movement will have to be specifically defined. A time limit is one aspect of this question.

Question 8. Should the liability be limited in amount and, if so, to what amount?

Again, before the Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety has established a process to consider which scenarios even invite consideration of liability and by whom, it would be impossible to comment on specific liability amounts.

One would simply note that liability limits are typical features of liability schemes, although issues do arise with respect to whether liability amounts are floors (i.e., to provide minimum compensation) or ceilings (i.e., a Party may not authorize more under its legal system).

Question 9. How would judgments given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?

Again, we are not in a position to comment at this stage on how liability judgments, if there were an international liability system[s] under the Protocol, would be recognized/enforced elsewhere.

We note that, in the United States, foreign civil and commercial judgments are generally enforceable in federal and state courts under the Uniform Foreign Money-Judgments Recognition Act, versions of which have been adopted by more than 30 States and the District of Columbia. In the remainder of the States recognition and enforcement is generally available under the rules of the common law as a matter of international comity. Foreign arbitral awards are enforceable under the terms of the 1958 United Nations Convention on the Recognition and Enforcement of International Arbitral Awards and the 1975 Inter-American Convention on International Commercial Arbitration, as implemented by the Federal Arbitration Act. We would be interested in learning more about how other countries treat liability judgments under their systems.

Question 10. What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

Without taking a position on whether arbitration should be used with respect to liability issues under the Protocol, we note that, technically, arbitration would be an available means for settling disputes arising with respect to damage in the field of liability and redress.

Question 11. What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

Again, without taking a position with respect to liability under this Protocol, we would generally not consider it appropriate for a State to be liable unless, perhaps, if the State were itself conducting the activity resulting in liability. Even in that case, such liability might be more properly addressed in State-to-State fora, rather than in domestic courts.

Question 12. Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

As with previous issues, it is premature to get into the substantive issue of who may make claims for damage under this Protocol, which would depend upon other aspects of any regime, including the definition of damage.

SUBMISSIONS FROM ORGANIZATIONS

GLOBAL INDUSTRY COALITION (GIC) [22 SEPTEMBER 2003]
[ORIGINAL: ENGLISH]

It is premature at present to explore the substantive elements of any rules or procedures that might derive from the Article 27 process until:

(a) A initial mandate for the Article 27 process, including the establishment and terms of reference for an open ended group of legal and technical experts has been agreed;

(b) Fundamental scientific and legal issues concerning the interaction of LMOs with the environment and the existence of legal rules and mechanisms already applicable to biotechnology have been examined; and

(c) Due account is taken of the ongoing process on liability and redress under the Convention on Biological Diversity and other developments in international law in which work on key definitions and concepts is already underway.

This initial work is necessary to establish a clear, transparent and objective foundation for the remainder of the Article 27 process which should be directed by the Parties on the basis of the results of the initial phase of work.

Accordingly, while it is premature to consider the substantive elements of any rules or procedures, the users and developers of biotechnology wish to share some information on the broad topics and legal concepts raised by the Liability and Redress Questionnaire.1/

Question 1: What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?

SUMMARY RESPONSE:

Perceptions and scenarios offered by Governments concerning the potential adverse effects of LMOs must be evaluated rigorously from both scientific and legal points of view to ensure that the Article 27 process that follows is properly focused on any realistic scenarios that may materialize and which are not already be governed by existing liability systems and principles.

RESPONSE:

The users and developers of biotechnology believe it is essential to explore the range of perceptions concerning the potential effects of LMOs and looks forward to reviewing the responses provided by Governments. *Once clear information about perceptions is available, scientific follow up will be necessary to determine which of these perceptions need to be addressed legally. Has a given scenario has actually materialized? From a scientific point of view, is the identified scenario more likely to occur than a comparable non-GMO scenario?*

The scientific context includes the fact that the OECD, FAO, WHO, U.S. National Academy of Sciences and other institutions have determined and have continued to confirm for more than 15 years that the safety criteria applicable to LMOs are identical to those needed to assess the safety of organisms resulting from other forms of breeding methods or natural evolution. Put another way, "[t]he risks associated with the production of recombinant DNA-engineered organisms are the same in kind as those

1/ See Annex to Recommendation 3/1 on Liability and Redress adopted by the Intergovernmental Committee for the Cartagena Protocol at its Third Meeting (The Hague, 22-26 April 2002).

associated with the introduction in the environment of unmodified organisms and organisms modified by other genetic techniques."2/ In short, "[t]here is no evidence that unique hazards exist either in the use of recombinant DNA techniques or in the transfer of genes between unrelated organisms." 3/

This conclusion was recently re-confirmed by the European Commission.4/ Indeed, according to the press release of European Union Commissioner Busquin: "*Research on the GM plants and derived products so far developed and marketed, following usual risk assessment procedures, has not shown any new risks to human health or the environment, beyond the usual uncertainties of conventional plant breeding. Indeed, the use of more precise technology and the greater regulatory scrutiny probably make them even safer than conventional plants and foods*; and if there are unforeseen environmental effects - none have appeared as yet - these should be rapidly detected by our monitoring requirements. On the other hand, the benefits of these plants and products for human health and the environment become increasingly clear."5/

As the foregoing indicates, the Article 27 process should not take as its primary model existing international environmental liability conventions that deal with hazardous activities which were established to meet unique needs that were not covered elsewhere. Rather, models for the Article 27 process should be drawn from rules governing activities that are comparable from a risk point of view to the transboundary movement of LMOs, i.e., the transboundary movement of non-modified living organisms such as plants, including commodities, or micro-organisms, e.g., for research purposes.

After completing a scientific assessment of perceptions and concerns, it also will be necessary to determine which remaining concerns fall within the parameters of Article 27 and should be addressed at the international, rather than national, level. Subsequently, Article 27 requires an evaluation of the extent to which such concerns are or will be addressed by ongoing process in international law, including the Article 14.2 process under the Convention on Biological Diversity.

Only if initial perceptions about transboundary movements of LMOs are evaluated in light of the existing scientific and legal contexts can the process thereafter properly focus on actual scenarios of potential concern for the conservation and sustainable use of biodiversity that are not adequately addressed by existing laws or legal principles. Without rigorous scientific and legal work at the inception to distinguish between sincerely voiced concerns versus actual threats, the Article 27 process risks losing sight of its fundamental goal of protecting biological diversity.

Question 2: What types of activities or situations should be covered under the international rules and procedures referred to in Article 27 of the Protocol?

SUMMARY RESPONSE:

2.1 *Only the activity explicitly identified in Article 27, namely, the actual transboundary movement of LMOs, can be covered* by any future international rules and/or procedures to be developed under the Article 27 process.

2/ 1987 U.S. National Academy of Sciences "Introduction of Recombinant DNA-Engineered Organisms into the Environment: Key Issues," at p. 5-6.

3/ Id.

4/ See "EC-sponsored Research on Safety of Genetically Modified Organisms - A Review of Results" EUR 19884. This publication provides a comprehensive review of the results of EC-supported research into the safety of Genetically Modified Organisms. It presents research carried out under successive EC Framework Programmes for Research and Technological Development from 1985 (Biotechnology Action Programme) to 2000 (Fifth Framework Programme). During this period, 81 projects, involving over 400 research teams, have been supported with a combined Community financial contribution of about EUR70 million. The research projects cover plants, plant microbes, biocontrol, food, bioremediation, tools, fish and vaccines.

5/ European Commission Press Release (October 2001).

2.2 Any international rules and/or procedures developed pursuant to Article 27 are *limited in scope to cases in which a transboundary movement of LMOs results in actual damage to the conservation and sustainable use of biodiversity*.

2.3 Any actual damage to the conservation and sustainable use of biodiversity would *have to meet alegal threshold, typically requiring evidence of "significant" rather than de minimis damage,* to trigger application of international rules and/or mechanisms.

EXPLANATION:

2.1 The international rules and procedures referred to in Article 27 of the Protocol can address only the activities identified in that article, which includes exclusively "transboundary movements" of LMOs. Consequently, activities other than the transboundary movements of LMOs *cannot* be covered under international rules and procedures that may be developed pursuant to Article 27.

Article 3(k) Protocol defines "transboundary movement" as the movement of an LMO from one Party to another Party (with additional provision for movements involving non-parties). The Article 27 process therefore applies only to the actual transport operation that results in the movement of LMOs from one jurisdiction to another. Such operations necessarily conclude when the movement is completed, i.e., when the shipment of LMOs arrives at its destination. *The Article 27 process therefore does not include and cannot address the handling or use of LMOs subsequent to the completion of the transboundary movement.*

This is supported by the terms of Article 4 of the Protocol, which distinguishes "transboundary movements" from "transit, handling and use" of LMOs. While a transboundary movement may (but need not) involve an element of transit, transit is not in itself a transboundary movement as it involves only movement of the LMO *through* the transit State, rather than *to* a receiving State, as required by the natural interpretation of Article 3(k). The same is true with "handling" which may occur as part of a transboundary movement but is not a transboundary movement subject to Article 27 in and of itself. That "use" is conceptually and practically distinct from "transboundary movements" is evident.

Similarly, it is clear from the wording of Articles 7 and 11 of the Protocol that a transboundary movement is to be distinguished from the eventual intended use of the LMO in the jurisdictions into which it has been brought. Thus, those Articles apply to:

> "… the first intentional transboundary movement of living modified organisms *for* intentional introduction into the environment;" and to
>
> "… the first transboundary movement of living modified organisms *intended for* direct use as fuel or feed …."

This wording makes it clear that the introduction into the environment, direct use as food, etc. takes place *once the transboundary movement is completed and are operations entirely separate from it*. While the transboundary movement is a necessary precondition of these subsequent activities, it does not form part of them for purposes of the Article 27 process.

Distinct and separate treatment of transboundary movement and subsequent use is not unique to the Protocol. It also can be seen in the Basel Convention, which distinguishes between "*transboundary movements* of hazardous wastes" on the one hand "*and their disposal"* on the other.

2.2 That the "damage" referred to in Article 27 is limited to damage to the conservation and sustainable use of biodiversity is compelled by the stated objective of the Protocol. As described in Article 1, the Protocol's purpose is to contribute to providing an adequate level of protection against potential adverse effects of LMOs on the conservation and sustainable use of biodiversity.

The restriction of Article 27 to damage to the conservation and sustainable use of biodiversity also follows from the fact that the Protocol derives from and is therefore a subsidiary instrument of the Convention. The Protocol's subsidiary position vis-a-vis the Convention is evidenced by the facts that:

(a) the Protocol was developed pursuant to an enabling clause in the Convention on Biological Diversity (see CBD, Art. 19.3); (b) only Parties to the Convention on Biological Diversity can become Parties to the Protocol (Art. 29); and (c) issues not specifically addressed by the Protocol are governed by the relevant provisions of the Convention (Art. 32).

Given that the Protocol is subsidiary to the Convention on Biological Diversity, Article 31(2) of the Vienna Convention on the Law of Treaties requires that it be interpreted in relation to the Convention on Biological Diversity. The clear focus of the Convention on Biological Diversity is on the conservation and sustainable use of biodiversity. Further, the Convention explicitly restricts consideration of liability and redress to "damage to biological diversity" and even then such damage is limited only to matters that are not purely internal concerns subject to the exclusive sovereign right of each nation to determine for itself. *The Convention's exclusive focus on damage to biodiversity means that it does not address traditional damage (including personal injury, property damage, consequential or economic loss but leaves these matters to national law, to the extent that such damage is not the subject of international treaties or other agreements. Because the Protocol derives from the authority of the Convention, to exceed the use and interpretation of these terms and concepts as they are employed in the Convention would require amendment of the Convention itself.*

2.3 International rules and/or mechanisms developed under the Protocol should be triggered only where the damage to the conservation and sustainable use of biodiversity is *significant*. A concrete threshold or trigger for the application of a legal system is commonplace and, indeed, is a concept embedded in the Protocol which aims to provide an "adequate" level of protection for the conservation and sustainable use of biodiversity. This same concept is found in the Convention on Biological Diversity, which does not consider all impacts on biodiversity as a breach of its obligations but only those that rise to a level of significance. Thus, under the Convention on Biological Diversity, States are obliged to "identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity" and to regulate those activities that may result in significant adverse impacts. (See CBD, Art. 7(c) and 8(l)). Similarly, under the Convention on Biological Diversity, environmental impact assessment is required only in cases where proposed activities are likely to significantly impact biodiversity. (See CBD, Art. 14.1).

The inclusion of a threshold concerning the level of actual damage to the conservation and use of biodiversity to trigger legal consequences is a standard part of national and international regimes. Indeed, Parties to the Convention on Biological Diversity *already have identified the need to address "the concept of 'threshold' in terms of both the risk presented and the damage" as a matter of priority in the Article 14.2 process*.6/ The need for a legal threshold for any rules or mechanisms developed under the Protocol process is supported by general principles of international environmental law, which require that liability attach only when the impact on the environmental value in question rises above a certain threshold of significance. According to the International Law Commission (ILC):

> The harm must lead to a real detrimental effect ... Such detrimental effects must be susceptible of being measured by factual and objective standards.... In carrying out lawful activities within their own territories, States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant," are considered tolerable. [T]he threshold of intolerance of harm cannot be placed below "significant."7/

6/ Report of the Workshop on Liability and Redress in the Context of the Biological Diversity Convention (18-21 June 2001, Paris), at paragraph 29.

7/ International Law Commission, Draft Articles on International Liability for Injurious Consequences Arising out of Acts not prohibited by International Law (1996), Commentary to Draft Article 2, paragraphs 4,5.

This general ILC position on the level of damage necessary to trigger operation of legal systems for recourse is supported by widespread treaty practice in environmental conventions.8/

Question 3: How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation and classification of damage within the framework of Article 14(2) of the Convention on Biological Diversity?

SUMMARY RESPONSE:

3.1 What constitutes "damage" to the conservation and sustainable use of biodiversity first must be determined, and then valued and classified, in accordance with the definitions set forth in the Convention on Biological Diversity.

3.2 Key terms and definitions in the field of liability and redress with respect to damage to the conservation and sustainable use of biodiversity under the Convention on Biological Diversity and its subsidiary instruments (including the Protocol) must be consistent and should first be developed in the broadest context (i.e., the Convention on Biological Diversity) before being considered for more specific situations.

EXPLANATION:

3.1 The Convention on Biological Diversity defines "biological diversity" in terms of variability.9/ Only the definition set forth in Article 2 of the Convention on Biological Diversity is relevant for either the Convention on Biological Diversity or the Protocol. *Damage to the conservation and sustainable use of biodiversity can, therefore, only be understood to mean a change in variability among living organisms, where such change in variability is also adverse, e.g., decreases biodiversity with respect to desirable, in contrast to pest, organisms.*

To establish the existence of damage to the conservation and sustainable use of biodiversity that may be subject to future international rules and/or mechanisms under Article 27, it will not be enough to demonstrate that LMOs arrived in a locale as a result of a transboundary movement. Indeed, given that a positive increase in variability of biodiversity may well result from the transboundary movement of LMOs, it is clear that mere presence of LMOs imported from another country is not enough. Instead, one must demonstrate that:

(a) The transboundary movement itself has resulted in a change in variability;

(b) The change is adverse; and

(c) The adverse change is significant.

The question of precisely when a change in variability becomes "adverse" and when it may be considered to be a "significant" adverse effect will require detailed work and analysis by experts concerning the valuation and classification of biodiversity as part of the Article 14.2 and Article 27 processes.

8/ Article 1(1) of the UN Framework Convention on Climate Change, for example, defines "adverse effects of climate change" as "changes in the physical environment or biota resulting from climate change which have *significant* deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare." Similarly, the Protocol on Environmental Protection to the Antarctic Treaty, dealing with one of the world's most pristine and fragile ecosystems, requires that "activities in the Antarctic Treaty area shall be planned and conducted so as to avoid: …. (ii) *significant* adverse effects on air or water quality; [and] (iii) *significant* changes in the atmospheric, terrestrial (including aquatic), glacial or marine environments…."

9/ See, Article 2: "Biodiversity means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems."

3.2 *As explained in Section 2.2, the Protocol is an agreement subsidiary to the Convention on Biological Diversity. In legal terms, therefore, the Parties to the Protocol cannot devise binding legal principles which go beyond the four corners of the Convention on Biological Diversity or terms that may contradict those utilized and/or to be developed pursuant to Article 14.2 of the Convention on Biological Diversity*. Further, it is clearly more appropriate for the general concepts and terms concerning liability for damage to the conservation and sustainable use of biodiversity to be established in a broader framework, as the rules for liability in the Convention on Biological Diversity must be capable of applying to the entire range of potential threats to biodiversity and additional rules and/or agreements that may be developed under the Convention on Biological Diversity concerning other specific situations (e.g. alien invasive species).

The usual legislative approach, both in international and domestic law, is to develop first the basic principles which are capable of general application and which allocate liabilities in an equitable manner (*lex generalis*) and then, where it is clearly shown to be necessary, to modify or refine those principles to enable them to apply to special circumstances which display particular characteristics (*lex specialis*). There is no scientific or legal reason to depart from this normal and generally accepted legislative practice in the case of LMOs.

Questions 4-9 and 12:

It is premature to begin to explore the substantive elements of any rules or procedures that might derive from Article 27 until the nature of the process envisaged by that Article has been determined by the States Parties to the Protocol at their first meeting. General information on the topics of channelling of liability, standards, exemptions, limitations (in time and amount), enforcement of judgements, and standing may be found in annex I.

Question 10: What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

RESPONSE:

Arbitration can play an extremely influential role in the determination of disputes arising in relation to liability and redress and, in this context, could well become the primary method for resolving any disputes. Arbitration is often preferable to other options because it:

(a) Offers the possibility of detailed and neutral resolution of disputes to an extent that may not be achievable in local courts;

(b) Enables the parties to a dispute to determine the procedure that will be followed by the tribunal (which is of considerable importance where the dispute is likely to involve significant volumes of detailed technical evidence);

(c) Enables the Parties to select the tribunal, ensuring that the tribunal possesses the necessary expertise and experience to determine difficult technical issues;

(d) Provides for the empanelling of expert assessors to evaluate or determine issues of fact;

(e) Frequently achieves significantly quicker results than domestic courts; and

(f) Results in awards that are widely enforceable through the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, which is very widely ratified.

Importantly for developing countries, many institutional arbitration systems provide extensive bureau and other support services to the Parties to assist with the processing of a claim.

Disputes between the States Parties to the Protocol may be resolved in accordance with the dispute resolution mechanisms set out in Article 27 of the Convention on Biological Diversity; i.e., negotiation followed by mediation to be followed, if unsuccessful, by either arbitration under Part I of annex II to the Convention on Biological Diversity or by reference to the International Court of Justice.

Question 11: What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

RESPONSE:

The users and developers of biotechnology believe this is primarily a matter for the consideration of Governments but is of the view that the dispute resolutions mechanisms that already apply to the Protocol might be a more productive avenue in case of any dispute that may arise between Governments.

Annex I

It is premature to explore the substantive elements of any rules or procedures that might derive from the Article 27 process until the nature of the process envisaged by that Article has been established by the Parties at the First meeting of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety. The private sector wishes, however, to share some information on the broad topics and legal concepts raised by questions 4-9 and 12 in order to contribute toward improved understanding of general legal principles often raised in these discussions.

CHANNELLING OF LIABILITY

Question 4: To whom should liability for damage resulting from transboundary movements of LMOs be channelled?

RESPONSE:

Liability should be borne by those who are at fault. Liability may be channelled to one or more persons for any given activity where fault exists; similarly, liability may be channelled to one person but with the right to seek redress against another who is at fault.

In short, liability should fall upon those who are at fault. A well-designed liability system allocates liability to various actors in relation to their respective levels of legal responsibility. Determining the appropriate allocation of responsibilities (i.e., channelling of liability) requires a detailed examination of the particular series of activities in question, the actors involved at various stages and their relative degrees of fault

The general approach of channelling liability to various actors for defined activities within their control may be seen in the Basel Protocol in connection with transboundary movements of hazardous materials and their subsequent disposal. Liability under that Protocol attaches to the carrier until the point at which the waste comes into the possession of the disposer, who then becomes responsible for the waste and potentially liable for any damage that occurs after taking possession.10/ This solution combines the features of many of the best known and most successful international regimes for the allocation of liability for environmental harm.11/

STANDARD OF LIABILITY

Question 5: What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?

10/ Article 4(1), Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Waste and their Disposal provides "The person who notifies in accordance with Article 6 of the Convention shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes." Unless the exporting State assumes the duty to notify under Article 6 of the Convention, the person referred to is the generator or exporter of the waste – see Article 6(1), Basel Convention.

11/ A similar approach can be seen in the widely accepted regime for civil liability for environmental harm arising from the carriage by sea of oil and for dangerous chemicals. Under the 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended), supplemented by the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. The model has recently been endorsed by the adoption by member states of the International Maritime Organisation of the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (not yet in force). See also, 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS) by Sea.

RESPONSE:

Absolute liability, which imposes liability on the defendant without the need for the plaintiff to prove fault *and which does not allow for any defences*, is virtually unknown in international environmental law.12/

Strict liability imposes liability with the need to prove causation but without the need to show fault. Commonly, it permits certain limited defences to be pleaded, including the permit defence and the state-of-the-art defence. Strict liability generally is limited to liability regimes for hazardous activities such as transport of oil and hazardous materials and nuclear activities.13/

Fault-based liability is commonly utilized for activities that are not inherently hazardous and requires the claimant to prove that the damage has occurred because of the wilful act, negligence or other culpable fault of the defendant.

EXEMPTIONS FROM LIABILITY

Question 6: Should there be any exemptions from liability? If so, under what circumstances?

RESPONSE:

Existing international liability conventions in the environmental field typically provide that no liability shall attach if the damage arose solely as a result of: war risks;14/ *force majeure*;15/ or sabotage or terrorism.16/ (The saboteurs or terrorists, on the other hand, would most certainly be subject to civil and potentially criminal liability for damage resulting from their acts.) Because they are entirely beyond the power of the defendant to avoid or control, exemptions for these classes of risk are customarily included in international environmental liability conventions as striking an appropriate balance between

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12/ The sole example is to be found in the Convention on Liability for Damage Caused by Space Objects, governing activities radically different from any other activity that may have an adverse effect on the environment and certainly cannot be compared to the situation concerning LMOs.

13/ See e.g., Article 4(1), Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Waste and their Disposal; Article III(1), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended); and Article 7(1), 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS) by Sea; and Article II, 1963 Vienna Convention on Civil Liability for Nuclear Damage.

14/ Article IV(3)(a), Vienna Convention on Civil Liability for Nuclear Damage; Article III(2)(a), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended); Article 8(a), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment; Article 7(2)(a), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea; Article 4(5)(a), Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal.

15/ Article III(2)(a), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended) ("natural phenomenon of an exceptional, inevitable and irresistible character"); Article 8(a), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment ("natural phenomenon of an exceptional, inevitable and irresistible character"); Article 7(2)(a), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea ("natural phenomenon of an exceptional, inevitable and irresistible character"); ; Article 4(5)(b), Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal. Article IV(3)(b), Vienna Convention on Civil Liability for Nuclear Damage as originally drafted contained an exemption for damage caused by a "grave natural disaster of an exceptional character", but this provision will be removed by Article 6(1) of the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, when it enters into force.;

16/ Article IV(2), Vienna Convention on Civil Liability for Nuclear Damage; Article III(2)(b), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended); Article 8(b), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment; Article 7(2)(b), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea; ; Article 4(5)(d), Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal.

protecting the interests of victims and doing justice to the defendant. Another common exemption exists where an act or omission resulting in harm is required by a responsible government agency.17/

Some conventions contain other exemptions, such as where damage is caused by tolerable levels of pollution under local circumstances,18/ where acts giving rise to the damage were taken in the interests of the person suffering damage (providing that it was reasonable to expose that person to the risk of damage) 19/ or where a failure of a responsible person to furnish information wholly or partly caused the damage.20/

Most conventions also provide an exemption to the extent that the damage is attributable to the gross negligence or fault of the person suffering the damage.21/

LIMITATION PERIODS

Question 7: Should liability be limited in time and, if so, for what period?

RESPONSE:

Domestic legal systems as well as international environmental conventions typically include provisions for limitation periods (often referred to as a statute of limitations) within which any person claiming to have suffered damage as a result of an incident is required to bring a legal claim. Claims filed after the limitations period will not be recognized and the cases will be dismissed.

These limitation periods vary in length, however, in general terms, claimants are expected to file their claims within a fairly short period after the incident alleged to have caused damage, typically around 3 years. A defined and relatively short limitations period promotes vigilance and care by potential claimants concerning their legal rights, results in fewer evidentiary problems, provides predictability for defendants, and, overall, contributes to a well-functioning legal system.

LIABILITY LIMITATIONS

Question 8: Should liability be limited in amount and, if so, to what amount?

RESPONSE:

Liability systems commonly include a maximum amount that any person could be legally compelled to pay upon being found responsible for the damage or violation in question. Such liability limitations or ceilings are established in order to strike the right balance between holding persons responsible for harm they may cause and avoiding that legal consequences deter persons from innovation,

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17/ Article IV(1)(c), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended); Article 8(c), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment ("resulted necessarily for compliance with a specific order or compulsory measure of a public authority"); ; Article 4(5)(c), Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal (same wording); Article 7(2)(c), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances By Sea.

18/ Article 8(d), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

19/ Article 8(e), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

20/ Article 7(2)(d), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea,

21/ Article IV(2), Vienna Convention on Civil Liability for Nuclear Damage; Article 4(5)(d), Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal refers to the "wrongful *intentional* conduct" of the plaintiff; Article IV(3), 1969 International Convention on Civil Liability for Oil Pollution Damage (as amended); Article IV, Vienna Convention on Civil Liability for Nuclear Damage; Article 9, Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment; Article 7(3), International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea.

technological advances and other pursuits that may benefit the public as a whole. Liability ceilings also may be important for insurability.

For the same reasons, maximum liability limitations are a standard feature of most international environmental liability instruments.22/

To achieve the desired societal objectives, liability limitations must not only exist but be established at appropriate levels, commensurate with the risks of given activities relative to other activities on the basis of sound science.

ENFORCEMENT OF JUDGEMENTS

Question 9: How would judgments given pertaining to liability and redress be recognised or enforced in another country/jurisdiction?

RESPONSE:

As part of the internationalisation of the administration of justice, States have entered into a multiplicity of treaties by which they provide for the recognition in each other's courts of judgments pronounced by other parties to the treaty and for the subsequent enforcement (e.g. by execution or seizure of property of the defendant within the jurisdiction of the State receiving the request). There are a number of multilateral agreements of this sort, often associated with regional economic integration organizations. 23/

This existing system of reciprocal recognition and enforcement of foreign judgements can be utilized to enforce judgements rendered by national courts, regardless of the particular subject matter.

STANDING TO BRING CLAIMS

Question 12: Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

RESPONSE:

The question of who has legal standing (the right) to bring claims for redress in any legal system, is highly complex but fundamentally reflects a policy judgement about which persons or entities are sufficiently involved with the matter in dispute to merit the possibility of pursuing legal action. In both national and international systems, legal standing to bring claims generally is confined to those who have suffered actual damage.

This insistence on a genuine interest stems from a desire to avoid the courts being flooded with (and the public bearing the costs of) claims which are without real substance from persons whose interest is only theoretical or moral. The proper method of advancing such claims lies in the political sphere.

Traditionally, the necessary interest to have standing has been narrowly defined to include only those with a close personal or property interest which is impacted by the matter in dispute. In recent years, however, this requirement has been relaxed somewhat to allow environmental interest groups *to*

22/ Article V(1), 1969 International Convention on Civil Liability for Oil Pollution Damage, as amended by 1992 Protocol, amendments adopted in October 2000, to enter into force on 1 November 2003; Article 9, International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances By Sea; Article 12(1) and appendix B, Basel Protocol on Liability and Compensation for Damage resulting from transboundary Movements of Hazardous Wastes and their Disposal. The disposer's liability is capped at 2 million SDRs. Liability of other persons unconnected with the transboundary movement or disposal is unlimited – see Article 12(2) – but these persons are likely to be unlawfully meddling with the waste.

23/ See, e.g., the EU's Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; and the Las Lenas Protocol on the recognition and enforcement of judgments and arbitral awards in the Mercosur.

challenge the decisions of public officials in matters relating to environmental issues with which the interest group is involved or on which it has special knowledge which would assist the court. In no case, however, has any international body accepted that such public interest groups may seek compensation for environmental harm.

GROUPE DE RECHERCHE ET D'ÉCHANGES TECHNOLOGIQUES (GRET)

[22 JULY 2004]
[ORIGINAL: FRENCH]

Question 1. What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?

Toutes les activités couvertes par le Protocole – transport, transit, manipulation et utilisation d'OVM sont susceptibles d'entraîner des dommages au niveau national. Un accent particulier doit être mis sur les transports qui constituent une source de contamination importante pour les semences. Ces activités peuvent concerner aussi bien les OVM destinés à l'utilisation en milieu confiné pour la recherche, les OVM destinés à être introduits dans l'environnement et les OVM destinés à l'alimentation animale ou humaine ou à la transformation. Des dommages peuvent avoir lieu indépendamment du caractère **intentionnel ou non intentionnel** des activités concernées.

Question 2. What types of activities or situations should be covered under international rules and procedures referred to in Article 27 of the Protocol?

Compte tenu des risques spécifiques liés aux OVM et en vertu du principe de précaution, la portée de règles internationales telles que mentionnées dans l'article 27 doit être la plus large possible. Toutes les activités mentionnées ci-dessus devraient donc être couvertes. Ces règles devraient également concerner les dommages résultant d'activités non intentionnelles et illégales (OVM non autorisés au niveau national).

Les alicaments (plantes alimentaires OGM produisant des médicaments) devraient également être couverts par les règles du Protocole. Ils peuvent être source de dommages à l'environnement de la même façon que les plantes OGM destinés à être introduits dans l'environnement ou destinés à l'alimentation. Le cas des OVM pharmaceutiques devrait également être étudié.

Question 3. How should the concept of "damage resulting from transboundary movements of LMOs" be defined, valued and classified, and should this be different from the definition, valuation and classification of within the framework of article 14, paragraph 2, of the CBD?

Le concept de dommages doit être défini de façon large et de façon cohérente avec l'approche adoptée dans le cadre de l'article 14. 2 de la Convention sur la diversité biologique. Cependant étant donné que les travaux sur l'article 14.2 de la Convention en sont à un stade peu avancé et face aux cas de contamination génétique observés dans plusieurs pays, il est nécessaire d'être proactif dans la définition des dommages et de ne pas attendre que ces travaux soient terminés pour commencer la réflexion sur l'article 27.

De façon générale, devraient être considérés comme dommages, non seulement les dommages sur la biodiversité (écosystèmes, habitats, espèces, centres d'origine de ressources génétiques et de centres de diversité génétique), mais également les dommages sur la santé humaine et animale et les dommages socio-économiques (préjudice économique ou commercial subis par les opérateurs de la chaîne alimentaire refusant les OVM – agriculteurs, transformateurs, distributeurs, etc.). Certains considèrent que la coexistence est impossible. Dans ces cas là, quelles sont les mesures envisageables pour éviter les

contaminations et assurer le libre choix des agriculteurs entre les cultures conventionnelles, biologiques et OGM ? Dans le cadre de l'article 27, des réponses juridiques et techniques devraient être apportées par rapport à cette question.

De façon plus précise, concernant les dommages à la biodiversité, l'ensemble des catégories de pertes généralement identifiées dans le droit de l'environnement devraient être pris en compte dans le cadre de l'article 27 : coûts des mesures de restauration, préjudices économiques liés à l'utilisation de ressources environnementales et coûts des mesures pour éviter des dommages. Les deux dernières catégories sont aisément calculables dans le cas des OVM : préjudice économique résultant d'un déclassement de lots, de perte de label ; coûts des mesures anti-contamination (zone refuge, système de rotation, etc.). Concernant les coûts des mesures de restauration, leur évaluation est plus délicate en raison de la spécificité des OVM – organismes vivants pouvant muter, générer des résistances à plus ou moins long terme- dont le retrait en cas de problème est impossible.

Une attention particulière doit être accordée dans l'article 27 sur le lien entre la traçabilité et l'évaluation des dommages *a posteriori* liés aux OGM (surveillance des risques de développement). En effet, la traçabilité est indispensable pour pouvoir prendre des mesures proportionnées de gestion du risque, telles que le retrait du marché en cas de problème ou d'effet néfaste inattendu.

Question 4. To whom should liability for damage resulting from transboundary movements of LMOs be channelled?

De façon générale, la responsabilité devrait être imputée en premier lieu au détenteur de l'autorisation, c'est-à-dire à l'auteur d'une notification du mouvement transfrontière (institut de recherche, université, firme du secteur semencier ou de l'agrochimie développant des OVM) pour les différentes catégories d'OVM. Il s'agit de la personne (au sens large) la plus facilement identifiable et la plus apte à réparer des dommages. Dans la perspective de règles internationales avec une portée large (voir ci-dessus), une responsabilité partagée avec d'autres acteurs du pays importateur (centre de recherche, agriculteur, etc.) choisissant délibérément d'utiliser des OVM pourrait être envisagée, notamment dans le cas où ceux-ci ne respecteraient les mesures de gestion des risques formulées par la législation nationale.

La mise en place d'une traçabilité doit pouvoir permettre d'identifier l'acteur à l'origine des dommages. Par conséquent, la question du lien entre traçabilité et imputation de la responsabilité devrait être considérée avec attention dans le cadre de l'article 27.

Question 5. What should be the standard for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?

La responsabilité objective devrait être appliquée au détenteur du permis d'exportation de l'OVM à l'origine des dommages, qu'ils soient volontaires ou involontaires. Concernant les autres acteurs, un régime de responsabilité basée sur la faute pourrait être envisagé dans la mesure où ils courent volontairement le risque d'un dommage sur l'environnement.

Question 6. Should there be any exemption from liability? If so, under what circumstances?

Il ne doit pas y avoir d'exonération de responsabilité de l'auteur de la notification (opérateur privé ou Etat) pour des risques inconnus scientifiquement au moment des faits (risque de développement). De même, les dommages causés par des OVM ayant été autorisés doivent être pris en compte.

Question 7. Should the liability be limited in time and, if so, to what period?

La couverture de la responsabilité ne devrait pas être limitée dans le temps et devrait comporter un terme d'au moins 30 ans compte tenu des délais liés aux mutations génétiques. Il s'agit de prendre en compte des dommages qui pourraient se produire longtemps après la dissémination de l'OVM dans l'environnement.

Question 8. Should the liability be limited in amount and if so, to what amount?

La responsabilité ne doit pas être limitée financièrement.

Question 9. How would judgements given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?

La juridiction compétente en matière de responsabilité et de réparation dans le cadre de l'article 27 est la juridiction nationale où le dommage survient. Le jugement émis par cette juridiction devrait être reconnu comme contraignant dans les territoires respectifs des parties contractantes.

Question 10. What would be the relevance of arbitration in setting disputes arising with respect to damage in the field of liability and redress?

La place accordée aux procédures d'arbitrage devrait être limitée. Les procédures judiciaires, plus contraignantes, devraient être favorisées.

Question 11. What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

La responsabilité de l'Etat ne pourrait être envisagée que de façon résiduelle et complémentaire à une responsabilité civile, dans le cas de mouvements transfrontières illégaux où le responsable ne peut pas être facilement identifié.

Question 12. Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

Les individus, les associations et/ou les institutions privées/publiques, les gouvernements et les tierces-parties doivent pouvoir porter plainte en cas de dommages.

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ADDITIONAL ISSUES AND COMMENTS

13. Functions and objectives

L'élaboration de règles internationales dans le cadre de l'article 27 devrait être basée sur les considérations suivantes :

(a) Objectif: le régime de responsabilité doit permettre d'assurer un niveau adéquat de protection dans le domaine de la manipulation et de l'utilisation des OGM au regard des risques environnementaux et sanitaires. Il doit avoir des fonctions de prévention, de réparation et d'incitation au respect d'obligations définies dans le Protocole.

(b) Principe de précaution : en l'absence de certitude sur l'innocuité des OVM, le principe de précaution doit être pris en compte. Il est nécessaire d'anticiper toute catastrophe (telle que la contamination de centres d'origine et de diversité d'espèces végétales) qui pourrait être causée par l'utilisation d'OVM.

(c) Notion d'irréversibilité: un régime de responsabilité sur les OVM doit prendre en compte les caractéristiques du sujet qu'il couvre. En particulier, tout dommage lié aux OGM peut se révéler dans une période de temps longue, se manifester de façon diffuse, graduelle et irréversible. Les règles sur la responsabilité doivent considérer le caractère exceptionnel des OVM.

(d) Principe pollueur payeur : chaque activité économique est supposée engager la responsabilité des acteurs. Le principe pollueur-payeur doit prévaloir en matière de responsabilité pour des dommages liés aux OVM. Les producteurs et les utilisateurs d'OGM qui sont à l'origine de la dissémination d'OVM dans l'environnement devraient être tenus responsables.

14. Financial security and funds

L'établissement d'un système de sécurité financière obligatoire est nécessaire pour assurer l'efficacité d'un régime de responsabilité et de réparation. Ainsi la souscription à une assurance ou le versement d'une garantie financière devrait être une condition préalable à toute autorisation. Les autorités nationales compétentes de la Partie exportatrice devraient ainsi s'assurer que les producteurs d'OVM ayant fait une demande d'expérimentation en champs et/ou de mise sur le marché, ont contracté une assurance et/ou déposé une garantie financière.

La question des non Parties devrait être prise en compte dans le cadre de règles sur la responsabilité. En effet, un pays importateur devrait pouvoir se voir octroyer le droit de refuser une importation qui provient d'un exportateur d'un pays non Partie qui n'aurait pas souscrit à une assurance.

Un fonds pourrait également fournir une sécurité financière pour la compensation des victimes, en complément d'une assurance obligatoire et lorsque le responsable ne peut pas s'acquitter de la réparation. Il ne doit en aucun cas signifier qu'une responsabilité ne doit pas être imputée. Le fonds ne pourrait être utilisé que dans des cas précis pour couvrir les mesures à prendre d'urgence. Les financements devraient être apportés par des entreprises qui détiennent les brevets et bénéficient directement des activités à l'origine des dommages.

INTERNATIONAL GRAIN TRADE COALITION (IGTC) [22 SEPTEMBER 2003]
[ORIGINAL: ENGLISH]

Response to the questionnaire in the annex to UNEP/CBD/ICCP/3/10

Question 1: What types of activities or situations covered under the Protocol are perceived as most likely to cause damage in your country and what kind of criteria are helpful in assessing damage to biodiversity resulting from transboundary movements of LMOs?

Response: Criteria for assessing damage to biodiversity resulting from transboundary movements of LMOs must be objective, transparent, and employ science-based principles. Damage to biodiversity must be readily observable, significant and calculable applying established fault-base liability principles (i.e., actual economic harm).

Question 2: What types of activities should be covered under international rules and procedures referred to in Article 27 of the Protocol?

Response: The actual transboundary movement itself of LMOs is not an appropriate focal point for the international rules and procedures referred to in Article 27 of the Protocol. Rather, such rules and procedures should apply to damage that may occur subsequent to the transboundary movement, and to those parties who are proven to be actually at fault for the damage, e.g., a local importer who diverts an LMO shipment for non-food, non-feed or non-processing purposes. It is also important that any actual damage to the conservation and sustainable use of biodiversity meets a legal threshold of significant, rather than de minimis, damage to trigger application of any international rules and procedures developed under the Protocol.

Question 3: How should the concept of "damage" resulting from transboundary movements of LMOs" be defined, valued and classified and should this be different from the definition, valuation and classification of damage within the framework of Article 14(2) of the Convention on Biological Diversity?

Response: Damage to be defined under Article 27 should mean a change in variability among species, where such change in variability is also adverse and significant. Furthermore, it is important that the rules

and definitions on liability and redress formulated under the Biosafety Protocol be consistent with similar rules and definitions under the Convention on Biological Diversity to avoid creating conflicts between both agreements.

Question 4: To whom should liability for damage resulting from transboundary movements of LMOs be channelled?

Response: Liability should be channelled to those who are directly at fault and apportioned among jointly liable parties in relation to their respective levels of responsibility and degrees of fault. Exporters and transporters who comply with their labelling and other obligations but which do not develop the technology, produce the products, or decide how the products get used when they reach the importing country, should not have liability under the Protocol.

Question 5: What should be the standard of liability for damage resulting from transboundary movements of LMOs, that is, should it be fault-based, strict or absolute?

Response: The standard of liability for LMO shipments of food, feed or further processing must be fault-based. In other words, it is imperative that liability be based upon conduct that constitutes, at minimum, negligence or some failure to exercise reasonable diligence or care. Exercising due care and following best practices should be available as a defense against liability claims. Furthermore, developing a liability regime based on strict or absolute liability for LMOs is ill advised because it would impose unmanageable and unknowable risks that are unworkable in a global, bulk commodity shipment environment. Without some commercial predictability, including who is liable and for what conduct may a party be held liable, the parties are unable to manage and provide for risks, including insurance, and injured parties could be left with no source for recovery.

Question 6: Should there be any exemption from liability? If so, under what circumstances?

Response: Existing international liability conventions in the environmental field typically provide that no liability shall attach if the damage arose solely as a result of: war risks; *force majeure;* or sabotage or terrorism. Because these events are entirely beyond the power of the defendant to avoid or control, exemptions for these classes of risk are customarily included in international environmental liability conventions as striking an appropriate balance between protecting the interests of victims and doing justice to the defendant. Another common exemption exists where an act or omission resulting in harm is required by a responsible government agency.

8. Some conventions contain other exemptions, such as where damage is caused by de minimis levels of pollution under local circumstances, where acts giving rise to the damage were taken in the interests of the person suffering damage (providing that it was reasonable to expose that person to the risk of damage) or where a failure or a responsible person to furnish information wholly or partly caused the damage.

9. Most conventions also provide an exemption to the extent that the damage is attributable to the party suffering the damage is itself negligent or at fault, or where that party willingly assumes the risk of a particular action. As noted earlier, exporters and transporters who comply with their labelling and other obligations but which do not develop the technology, produce the products, or decide how the products get used when they reach the importing country, should not have liability under the Protocol.

Question 7: Should liability be limited in time and, if so, to what period?

Response: Domestic legal systems as well as international environmental conventions typically include provisions for limitation periods (often referred to as a statute of limitations) within which time any person claiming to have suffered damage as a result of an incident is required to bring a legal claim. Claims filed after the limitations period will not be recognized and the cases will be dismissed.

10. These limitation periods vary in length but generally claimants are expected to file their claims within a fair and reasonable period after the incident alleged to have caused damage, typically

around 3 years. A defined and reasonable limitations period promotes vigilance and care by potential claimants concerning their legal rights, results in fewer evidentiary problems, provides predictability and enhances insurability for potential defendants, and, overall, contributes to a well-functioning legal system.

Question 8: Should liability be limited in amount and, if so, to what amount?

Response: Liability systems commonly include a maximum amount that any person or entity could be legally compelled to pay upon being found responsible for the damage or violation in question. Such liability limitations or ceilings are established in order to strike the right balance between holding persons responsible for harm they may cause and avoiding that legal consequences deter persons from innovation, technological advances and other pursuits that may benefit the public as a whole. Liability ceilings are also important for insurability.

11. For the same reasons, maximum liability limitations are a standard feature of most international environmental liability instruments.

12. To achieve the desired societal objectives, liability limitations must not only exist but be established at appropriate levels, commensurate with the risks of given activities relative to other activities on the basis of sound science. For LMO cargos for food, feed or further processing, the maximum liability applicable to parties responsible for the transboundary movement of commodity shipments should be the value of the cargo or possibly some reasonable multiple of such value (e.g., twice).

Questions 9: How would judgments given pertaining to liability and redress be recognized or enforced in another country/jurisdiction?

Response: As part of the internationalisation of the administration of justice, States have entered into a multiplicity of treaties by which they provide for the recognition in each other's courts of judgements pronounced by other Parties to the treaty and for the subsequent enforcement (e.g. by execution or seizure of property of the defendant within the jurisdiction of the State receiving the request). There are a number of multilateral agreements of this sort, often associated with regional economic integration organizations.

This existing system of reciprocal recognition and enforcement of foreign judgements can be utilized to enforce judgements rendered by national courts, regardless of the particular subject matter.

An impartial third party is essential in determining liability and redress under a science-based, fault-based liability and redress system. Notwithstanding the theoretical rules which are adopted to determine and allocate liability, costs will increase substantially and trade will be disrupted and inhibited if trading partners are forced to defend their actions in numerous countries based upon what may be politically-inspired challenges.

Consequently, the Protocol should require that companies in the international development, sale and distribution of LMOs participate in an international arbitration system to resolve disputes over LMO transboundary movements.

Question 10: What would be the relevance of arbitration in settling disputes arising with respect to damage in the field of liability and redress?

Response: Arbitration can plan an extremely positive role in the determination of disputes arising in relation to liability and redress and, in this context, could well become the primary method for resolving any disputes.

Arbitration is often preferable to other options because it:

(a) Offers the possibility of detailed and neutral resolution of disputes to an extent that may not be achievable in local courts;

(b) Enables the parties to a dispute to determine the procedure that will be followed by the tribunal (which is of considerable importance where the dispute is likely to involve significant volumes of detailed technical evidence);

(c) Enables the parties to select the tribunal, ensuring that the tribunal possesses the necessary expertise and experience to determine difficult technical issues;

(d) Provides for the empanelling of expert assessors to evaluate or determine issues of fact;

(e) Frequently achieves significantly quicker and more cost-efficient results than domestic courts; and

(f) Results in awards that are widely enforceable through the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, which is widely ratified.

Importantly for developing countries, many institutional arbitration systems provide extensive bureau and other support services to the parties to assist with the processing of a claim. Disputes between the States Parties to the Protocol may be resolved in accordance with the dispute resolution mechanisms set out in Article 27 of the Convention on Biological Diversity; i.e., negotiation followed by mediation to be followed, if unsuccessful, by either arbitration under part I of annex II to the Convention on Biological Diversity or by reference to the International Court of Justice.

Question 11: What purpose would the notion of State liability and State responsibility serve in a liability and redress regime within the framework of the Cartagena Protocol?

Response: This is primarily a matter for the consideration of Governments.

Question 12: Who should have the right to make claims for damage resulting from transboundary movements of LMOs?

Response: While this is a complex question, the answer should fundamentally reflect a policy judgement about which persons or entities are sufficiently involved with the matter in dispute to merit the possibility of pursuing legal action. In both national and international systems, legal standing to bring claims generally is confined to those who have suffered actual, direct economic damage and not those whose interest is based on political or social ground (e.g., public interest groups seeking compensation for environmental harm).
